Noraini bt Mohamed Hadi v Pembangunan Tanah dan Perumahan Sdn Bhd and another appeal

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS J-02 (NCvC)(W)-1802–09 OF 2018 AND J-02(NCvC)(W)-1801–09 OF 2018

B

AHMADI ASNAWI, ABDUL KARIM, LEE SWEE SENG JJCA

6 MAY 2020

C

Land Law — Title — Subdivision — Claim for subdivided title land — Sale and purchase agreement — Appellant bought land from first purchaser — Respondent argued that first purchaser and appellant had no interest and title to land — Whether respondent was ultimate vendor that ratified first sale and purchase agreement and recognized title of first purchaser — Whether respondent was a bare trustee with respect to said lot in issued subdivided title — Whether four vendors could enter into a valid sale and purchase agreement with first purchaser of undivided land in lot before becoming registered owner — Whether the respondent's refusal to transfer the subdivided titles to the appellant was fraud against the appellant — Whether appellant's claim was barred by limitation or laches — Whether it was fit case for appellate intervention

D

E

The original registered owner ('the defendant') had bought a piece of land under a Master Title CT 17421 Lot 4648 ('the land') from one Kheng Hup Co Ltd ('KH') and became its registered owner in May 1968. The defendant argued that the land claimed by the plaintiff in Lot 536 was bought from the first purchaser who had entered into a sale and purchase agreement with the four vendors before the defendant's purchase of the same land from KH. The defendant argued that the plaintiff could not trace the title to the defendant's purchase which came subsequent. The land that the plaintiff bought was part of the many empty lots of land forming part of the master title which was subsequently subdivided with the plaintiff claiming title to the subdivided title held under Geran 316324 Lot 29589 Mukim Plentong, Johor Bahru ('the unsubdivided title') were still under the name of the defendant. There were receipts issued by the defendant to the first purchaser and by one solicitor Messrs Goh Bin Lay & Co, which the plaintiff said acted for the defendant. The plaintiff duly informed the defendant of the purchase and wrote a few time to the defendant asking for the subdivided title. The plaintiff had been to the defendant's office on many occasion to ask for the subdivided title but was told to wait. At no material time did the defendant say that it did not recognise the interest and title of the first purchaser and with that, the interest and title of the appellant. The appellant was paying the quit rent and assessment for the lot since buying it from the first purchaser. The plaintiff prayed for a declaration that the defendant was a trustee of the lot purchased, for the plaintiff and also

F

G

H

I

for an order for the defendant to execute the various instruments of transfer to effect the transfer of the subdivided title to the plaintiff. The defendant counterclaimed for trespass, damages and for removal of the plaintifft's caveat. The learned High Court judge had granted the defendant the relief of vacant possession and removal of the plaintiff's caveat and an assessment of damages, including exemplary damages for loss of use of the land and for wrongful entry of the plaintiff's caveat. The plaintiff dissatisfied with the judgment against her, appealed to this court against both decisions. The issues to be determined were: (a) whether the defendant was the ultimate vendor that ratified the first sale and purchase agreement and recognised the title of the first purchaser to the lot; (b) whether the defendant was a bare trustee with respect to the said lot in the issued subdivided title; (c) whether the four vendors could enter into a valid sale and purchase agreement with the first purchaser of the undivided land in the lot before becoming its registered owner; (d) whether the defendant's refusal to transfer the subdivided titles to the plaintiff was fraud against the plaintiff; (e) whether the plaintiff claim was barred by limitation or laches; and (f) whether the case was fit for appellate intervention.

Held, allowing appeal with costs of RM25,000 subject to payment of allocator:

(1) While there are some dotted lines initially between the four vendors and their attorney, Syed Ali, and the defendant, ultimately looking at the overall circumstances of the case and the documents presented as well as the conduct of the parties, the dotted lines could comfortably be joined together to link the defendant to the lot in question as being substantially the real vendor having overall charge of the whole development project called Taman Saujana. Further, a close look at all the original receipts produced, mostly by the defendant, and together with some receipts issued by Messrs Goh Bin Lay & Co, added up to the total purchase price for the lot of land purchased by the first purchaser (see paras 34 & 36).

(2) Payment to one's agent was as good as payment to the client and, in this case, it was the defendant who, on its own, also issued receipts to the first purchaser for most of the instalment payments of the purchase price. There were 13 receipts issued by Messrs Goh Bin Lay & Co out of which six receipts were issued even before the defendant's incorporation. The memorandum and articles of association of the defendant and the signature of the said solicitors at the end of the M&A showed that it was more likely than not that the firm of Messrs Goh Bin Lay & Co were the solicitors that acted for the defendant with respect to its incorporation. It was not unnatural for a firm of solicitors to issue receipts on behalf of the promoters of company before its incorporation. The connection in the receipts issued by Messrs Goh Bin Lay & Co lies in the Lot 536 which was also Lot 536 in the receipts issued by the defendant and it was the lot stated in the first SPA and the second SPA and PA. Section 90 of the EA specifically addressed the difficulties to call makers of documents more

than 20 years, as in this case. The court's discretion, with respect to whether to draw a presumption as to the genuineness of the signature and with that the contents represented by the signature, has to be exercised judicially. In this case, the discretion was exercised in favour of the plaintiff seeing that some 40 years had passed since the receipts were said to have been issued (see paras 39, 42, 44–45 & 49–50).

(3) The first SPA and the receipts issued by the defendant and Messrs Goh Bin Lay & Co, read together with the schedule of instalment payments and the subsequent second SPA and PA, gave rise to the inference that Syed Ali, who signed the first SPA on behalf of the four vendors and who was the defendant's founding director, was in all probabilities authorised by the defendant to so act or that the defendant had otherwise ratified the sale of the lot as being made by the defendant. The fact that the defendant had accepted the payments of the purchase price as payments required by the defendant under the first SPA and as pleaded by the plaintiff, meant that the defendant had adopted, affirmed, recognised and ratified the first SPA (see paras 71–72).

(4) It was too late in the day for the defendant to raise the objection that ratification of the January 1968 SPA in the first SPA was not specifically pleaded. The fact of full payment of the purchase price by the first purchaser was material and there was no need for the word 'ratification' to have been used in the statement of claim as legal consequences need not be pleaded but a matter for legal argument during submission. There was no prejudice caused to the defendant and the defendant was certainly not caught by surprise for its stand was merely that the first SPA was not signed with the defendant but with unrelated individuals (see paras 74–75).

(5) The conduct of the defendant in not reverting to the purchaser after being notified of the second SPA and PA with respect to confirmation of the first purchaser's title to Lot 536 and the fact that the final subdivided title had been issued was more blameworthy than the plaintiff not having made a land search before purchasing from the first purchaser. The position of the law on subsale of the land or property where its title was not issued was always been by a sale and purchase agreement together with an assignment of the sale or a power of attorney (see paras 87 & 89).

(6) There was no need for the developer or original owner to be a party to the subsale SPA much less to give consent to the subsale but that the purchaser in the subsale only needed to give notice of the sale or assignment to the original owner of the master title like the defendant. The court was more than satisfied that the appellant had shown she was a bona fide purchaser. The court concluded on the balance of probabilities that the first purchaser had fully paid the purchase price when he bought the said lot from the defendant, which for all intents and

purposes, had recognised, adopted, affirmed, accepted and ratified the first SPA in and stepped into the shoes of the four vendors (see paras 89, 99 & 113).

(7) The position of the registered owner who was paid in full by the first purchaser was that of a bare trustee or that of a constructive trustee who had an obligation to transfer the subdivided title to the subsequent purchaser like the plaintiff who had given notice of the transfer to the defendant as the registered owner. The writ itself was sufficient notice to effect the transfer and the defendant had not come to court to say that because of a lack of notice, it had already sold the lot to a third party. A vendor who had received the full purchase price and a court of law would impose on the vendor a constructive trust, holding the property for the purchaser and persons deriving title or claiming title through the purchaser. Any refusal to transfer the said property to the plaintiff would be a breach of trust by the defendant (see paras 114, 116 & 136–137).

(8) The court could not agree with the trial judge's conclusion that as the four vendors did not become the registered owner of the land, they were incapable of passing title to the first purchaser for the respective lot and based on the nemo dat principle, the plaintiff could not have derived any title from the first purchaser. The position of the law was clear in that the defendant, having received the full purchase price from the first purchaser, was legally bound to transfer the subdivided title in the lot to the nominee, lawful done or assignee under the second SPA and power of attorney (see paras 151 & 153).

(9) The court agreed that whether the act of the respondent consisted of a subsequent sale to the third party or a refusal to transfer to the first purchaser and the present purchaser in the appellant, the effect was the same: it was to deprive the appellant of the rightful title to the land. The court was more that satisfied based on the standard of proof, the appellant had established fraud on the part of the respondent (see paras 176 & 182).

(10) The court agreed with learned counsel for the appellant that the law on limitation period started to run when there was clear and unequivocal threat to dispossess the appellant from the land by the respondent. There was no evidence to show that the defendant would be executing the transfer form in Form 14A of the National Land Code and delivering the subdivided title to the first purchaser. The defence of laches was more remote and illusory. In the context of a vendor was a bare trustee or constructive trustee, it did not lie in the vendor's mouth to resist specific performance on ground of laches (see para 184, 191 & 194).

(11) The court was of the view that the trial judge was plainly wrong in not sufficiently appreciating the documentary evidence of payments made by

the first purchaser to the respondent and the payments of quit rent and assessment for the lot purchased by the appellant from the first purchaser. There was no link between the four vendors and the defendant and failing to conclude that the defendant was the ultimate vendor that had recognised, adopted, affirmed and ratified the first SPA. Further, there was evidence of due notice having been given by the plaintiff to the defendant on the title to the lot that she had acquired from the first purchaser (see paras 200–201).

[Bahasa Malaysia summary

Pemilik berdaftar asal ('defendan') telah membeli sekeping tanah di bawah Hakmilik Induk CT 17421 Lot 4648 ('tanah tersebut') dari satu Kheng Hup Co Ltd ('KH') dan menjadi pemilik berdaftar pada bulan Mei 1968. Defendan berpendapat bahawa tanah yang dituntut oleh plaintif di Lot 536 telah dibeli dari pembeli pertama yang telah memasuki perjanjian jual beli dengan keempat-empat penjual tersebut sebelum defendan membeli tanah yang sama dari KH. Defendan berpendapat bahawa plaintif tidak dapat mengesan hak milik terhadap pembelian defendan yang berlaku kemudiannya. Tanah yang dibeli oleh plaintif adalah sebahagian daripada banyak tanah kosong yang menjadi sebahagian daripada hakmilik induk yang kemudiannya dipecahkan dengan plaintif yang menuntut hak milik kepada hak milik dipecah bahagian yang dipegang di bawah Geran 316324 Lot 29589 Mukim Plentong, Johor Bahru ('hakmilik tidak dipecahkan') yang masih di bawah nama defendan. Terdapat resit yang dikeluarkan oleh defendan kepada pembeli pertama dan oleh seorang peguamcara, Tetuan Goh Bin Lay & Co, yang dikatakan oleh pihak plaintif bertindak bagi defendan. Plaintif dengan memaklumkan kepada defendan mengenai pembelian tersebut dan menulis beberapa kali kepada defendan untuk meminta hakmilik pecah bahagian. Plaintif telah beberapa kali ke pejabat defendan untuk meminta hakmilik pecah bahagian tersebut tetapi telah dimaklumkan untuk tunggu dahulu. Tidak ada pada masa-masa yang material defendan mengatakan bahawa ia tidak mengakui kepentingan dan hak milik pembeli pertama dan dengan itu, kepentingan dan hak milik perayu. Perayu membayar cukai tanah dan taksiran untuk lot tersebut sejak membelinya dari pembeli pertama. Plaintif memohon satu deklarasi bahawa defendan adalah pemegang amanah atas lot yang dibeli, untuk plaintif dan juga satu perintah agar defendan melaksanakan pelbagai instrumen pindah milik untuk menguatkuasakan pindah milik bagi hak milik pecah bahagian tersebut. Defendan menuntut balas atas pencerobohan, ganti rugi dan pembatalan kaveat oleh plantif. Hakim Mahkamah Tinggi yang bijaksana telah membenarkan relif kepada defendan bagi milikan kosong dan pembatalan kaveat oleh plaintif dan penilaian ganti rugi, termasuklah ganti rugi teladan bagi kehilangan penggunaan tanah dan kemasukan kaveat secara salah oleh plaintif. Plaintif tidak berpuas hati dengan penghakiman terhadapnya, merayu ke mahkamah ini terhadap kedua-dua keputusan tersebut. Isu-isu yang harus ditentukan adalah: (a) sama ada defendan adalah penjual utama yang

mengesahkan perjanjian jual beli pertama dan mengakui hak milik oleh pembeli pertama untuk lot tersebut; (b) sama ada defendan adalah pemegang amanah biasa atas lot tersebut bagi hak milik pecah bahagian yang dikeluarkan; (c) sama ada keempat-empat penjual dapat memasuki perjanjian jual beli yang sah dengan pembeli pertama tanah bagi tanah yang tidak dipecah bahagian dalam lot tersebut sebelum menjadi pemilik berdaftar; (d) sama ada keengganan defendan untuk memindahkan milik hak milik pecah bahagian tersebut kepada plaintif adalah penipuan terhadap plaintif; (e) sama ada tuntutan plaintif dihalang oleh had masa atau laches; dan (f) sama ada kes semasa sesuai untuk campur tangan Mahkamah Rayuan.

Diputuskan, membenarkan rayuan dengan kos RM25,000 tertakluk kepada pembayaran alokatur:

(1) Walaupun terdapat hubungan secara tidak langsung pada awalnya antara keempat-empat penjual dan peguamcaranya, Syed Ali, dan defendan, dalam melihat keadaan keseluruhan kes dan dokumen-dokumen yang dikemukakan serta tingkah laku pihak-pihak, hubungan secara tidak langsung tersebut dapat dicantumkan dengan sempurna untuk menghubung defendan dengan lot yang dimaksudkan sebagai penjual sebenarnya yang mempunyai keseluruhan kawalan bagi projek pembangunan yang dikenali sebagai Taman Saujana. Selanjutnya, perhatian teliti pada kesemua resit asal yang dikemukakan, kebanyakan oleh defendan, dan bersama-sama dengan beberapa resit yang dikeluarkan oleh Tetuan Goh Bin Lay & Co, ditambah sehingga menjadi jumlah harga belian lot tanah yang dibeli oleh pembeli pertama (lihat perenggan 34 & 36).

(2) Pembayaran kepada ejen seseorang adalah sama dengan pembayaran kepada anak guam dan, dalam hal ini, ianya adalah defendan, dengan sendirinya, juga telah mengeluarkan resit kepada pembeli pertama untuk sebahagian besar pembayaran ansuran atas harga belian. Terdapat 13 resit yang dikeluarkan oleh Tetuan Goh Bin Lay & Co, di mana enam resit dikeluarkan sebelum penubuhan defendan. Memorandum dan tataurusan syarikat defendan dan tandatangan peguamcara tersebut pada akhir M&A menunjukkan bahawa kemungkinan besar firma Tetuan Goh Bin Lay & Co adalah peguam yang bertindak bagi defendan atas penubuhannya. Adalah perkara biasa bagi firma peguam untuk mengeluarkan resit bagi pihak promoter syarikat sebelum penubuhannya. Hubung kait resit yang dikeluarkan oleh Tetuan Goh Bin Lay & Co terletak pada Lot 536 yang juga Lot 536 dalam resit yang dikeluarkan oleh defendan dan ianya adalah lot yang dinyatakan dalam SPA pertama dan SPA dan PA kedua. Seksyen 90 AK secara khusus menangani kesulitan dalam memanggil pembuat dokumen lebih dari 20 tahun, seperti dalam kes ini. Budi bicara mahkamah, berkenaan dengan sama ada untuk membuat anggapan mengenai kesahihan tandatangan

dan dengan kandungan tandatangan tersebut, harus dilaksanakan secara adil. Dalam kes ini, budi bicara dilaksanakan bagi plaintif dalam melihat bahawa lebih kurang 40 tahun telah berlalu sejak resit tersebut dikatakan telah dikeluarkan (lihat perenggan 39, 42, 44–45 & 49–50).

(3) SPA pertama dan resit yang dikeluarkan oleh defendan dan Tetuan Goh Bin Lay & Co, dibaca bersama dengan jadual pembayaran ansuran dan SPA dan PA kedua berikutnya, membangkitkan kesimpulan bahawa Syed Ali, yang menandatangani SPA yang pertama bagi pihak keempat-empat penjual dan yang merupakan pengarah pengasas defendan, berkemungkinan besar diberi kuasa oleh defendan untuk bertindak atau bahawa defendan telah mengesahkan penjualan lot sebagai dibuat oleh defendan. Fakta bahawa defendan telah menerima pembayaran harga belian sebagai pembayaran yang diminta oleh defendan di bawah SPA pertama dan seperti yang diplidkan oleh plaintif, membawa maksud bahawa defendan telah menggunapakai, menyatakan, mengakui dan mengesahkan SPA pertama (lihat perenggan 71–72).

(4) Ianya sudah terlambat bagi defendan untuk membangkitkan bantahan bahawa pengesahan SPA Januari 1968 dalam SPA pertama tidak secara khusus dplidkan. Penyataan bahawa pembayaran penuh harga belian oleh pembeli pertama adalah penting dan tidak perlu perkataan 'ractification' digunakan dalam penyataan tuntutan kerana kesan undang-undang tidak perlu diplidkan tetapi perkara untuk pertikaian undang-undang semasa penghujahan. Tidak ada prejudis terhadap defendan dan defendan tentu tidak terkejut dengan pendiriannya kerana SPA pertama tidak ditandatangani dengan defendan tetapi dengan individu yang tidak berkaitan (lihat perenggan 74–75).

(5) Tindakan defendan dalam tidak berbalik semula kepada pembeli setelah dimaklumkan tentang SPA dan PA kedua berhubung dengan pengesahan hak milik pembeli pertama atas Lot 536 dan fakta bahwa hak milik pecahan bahagian muktamad telah dikeluarkan adalah lebih menyalahkan daripada plaintif tidak membuat carian tanah sebelum membeli daripada pembeli pertama. Kedudukan undang-undang mengenai penjualan semula tanah atau hartanah di mana hak miliknya tidak dikeluarkan adalah biasanya dijalankan melalui perjanjian jual beli bersama dengan pengahihan hak penjualan atau surat kuasa wakil (lihat perenggan 87 & 89).

(6) Ianya tidak ada keperluan bagi pemaju atau pemilik asal untuk menjadi pihak dalam SPA penjualan balik apalagi untuk memberikan persetujuan untuk penjualan balik tetapi pembeli dalam penjualan balik hanya perlu menyerahkan notis mengenai penjualan atau penyerahan hak kepada pemilik asal hakmilik induk seperti defendan. Mahkamah berpuas hati bahawa perayu telah menunjukkan bahawa beliau adalah pembeli suci hati. Mahkamah membuat kesimpulan pada imbangan kebarangkalian

bahawa pembeli pertama telah membayar sepenuhnya harga belian apabila beliau membeli lot tersebut dari defendan, yang untuk semua maksud dan tujuan, telah mengiktiraf, menggunapakai, menyatakan, menerima dan mengesahkan SPA pertama dalam tempat empat penjual (lihat perenggan 89, 99 & 113).

(7) Kedudukan pemilik berdaftar yang telah dibayar sepenuhnya oleh pembeli pertama adalah sebagai pemegang amanah biasa atau pemegang amanah konstruktif yang mempunyai tanggungjawab untuk memindahkan hak milik pecahan bahagian kepada pembeli seterusnya seperti plaintif yang telah menyerahkan notis pindah milik kepada defendan sebagai pemilik berdaftar. Writ tersebut sendiri adalah notis yang mencukupi untuk menguatkuasakan pindah milik tersebut dan defendan tidak datang ke mahkamah untuk mengatakan bahawa oleh kerana ketiadaan notis, pihaknya telah menjual lot tersebut kepada pihak ketiga. Penjual yang telah menerima belian penuh dan mahkamah undang-undang akan mengenakan amanah konstruktif kepada penjual, memegang hartanah untuk pembeli dan orang yang memperoleh hakmilik atau menuntut hakmilik melalui pembeli. Sebarang keengganan untuk memindah milik hartanah tersebut kepada plaintif akan menyebabkan kepada pecah amanah oleh defendan (lihat perenggan 114, 116 & 136–137).

(8) Mahkamah tidak bersetuju dengan kesimpulan hakim perbicaraan bahawa oleh kerana keempat-empat penjual tersebut tidak menjadi pemilik tanah yang didaftarkan, mereka tidak mempunyai keupayaan untuk menyerahkan hakmilik kepada pembeli pertama bagi lot masing-masing dan berdasarkan prinsip nemo dat, plaintif tidak dapat memperoleh sebarang hakmilik daripada pembeli pertama. Kedudukan undang-undang adalah jelas di mana defendan, setelah menerima harga belian penuh dari pembeli pertama, secara undang-undang terikat untuk memindahkan hak milik pecahan bahagian atas lot kepada penama, yang sah atau yang diserahkan hak di bawah SPA kedua dan surat wakil kuasa (lihat perenggan 151 & 153).

(9) Mahkamah bersetuju bahawa sama ada tindakan responden terdiri dari jualan seterusnya kepada pihak ketiga atau keengganan untuk memindah milik kepada pembeli pertama dan pembeli semasa atas perayu, kesannya adalah sama: adalah untuk melucutkan hak perayu atas hakmilik tanah. Mahkamah berpuas hati atas tahap pembuktian, perayu telah membuktikan penipuan pada pihak responden (lihat perenggan 176 & 182).

(10) Mahkamah bersetuju dengan peguamcara perayu yang bijaksana bahawa undang-undang had masa bermula apabila wujudnya ancaman yang jelas dan nyata untuk menafikan hak perayu atas tanah tersebut oleh responden. Tidak ada keterangan yang menunjukkan bahawa defendan

akan menandatangani borang pindah milik melalui Borang 14A Kanun Tanah Negara dan menyerahkan hak milik pecahan bahagian kepada pembeli pertama. Pembelaan *laches* adalah tidak terpakai dan bersifat ilusi. Dalam konteks bahawa penjual adalah pemegang amanah biasa atau pemegang amanah konstruktif, ia tidak terletak pada kata-kata penjual untuk menghalang perlaksaan spesifik atas alasan *laches* (lihat perenggan 184, 191 & 194).

(11) Mahkamah berpendapat bahawa hakim perbicaraan telah dengan jelas terkhilaf kerana tidak dengan secukupnya mengambil kira keterangan dokumentari atas pembayaran yang dibuat oleh pembeli pertama kepada responden dan pembayaran cukai pintu dan taksiran untuk lot yang dibeli oleh perayu dari pembeli pertama. Tidak ada hubungan antara keempat-empat penjual dan defendan dan kegagalan untuk menyimpulkan bahawa defendan adalah penjual utama yang telah mengiktiraf, menggunapakai, menyatakan dan mengesahkan SPA pertama. Selanjutnya, terdapat keterangan notis yang telah diserahkan oleh plaintif kepada defendan atas hakmilik lot tersebut yang telah beliau perolehi dari pembeli pertama. (lihat perenggan 200–201).]

Cases referred to

Abdul Rahim Sinon v Pembangunan Tanah dan Perumahan Sendirian Berhad & Anor [2016] 1 LNS 1079, HC (refd)

Allied Bank (M) Sdn Bhd v Yau Jiok Hua [2006] 5 MLJ 145; [2006] 3 CLJ 27, CA (refd)

Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1981] 3 All ER 577, CA (refd)

Ang Toon Chew & Sons (M) Sdn Bhd v Personal Representatives of Mohamed Taib bin Yusoff, deceased [1998] 5 MLJ 481, HC (refd)

Arab-Malaysian Merchant Bank Bhd v Chong On Foh Medical Hall & Liquor Dealers [1997] 4 MLJ 532; [1996] 2 CLJ 667, HC (refd)

Azilah bin Hadri & Anor v PP and another appeal [2013] 5 MLJ 309; [2013] 5 MLRA 212, CA (refd)

Bakar Salleh v Hj Abdul Malik Bahadan [1990] 3 MLRH 146 (refd)

Bank of Tokyo-Mitsubishi (M) Berhad v Sim Lim Holdings Berhad & Ors [2001] MLJU 125; [2001] 2 CLJ 474, HC (refd)

Besharapan Sdn Bhd & Ors v Agroco Plantation Sdn Bhd & Anor [2007] 1 MLJ 101; [2006] 4 CLJ 878, CA (refd)

Bolo v Koklan [1930] AIR PC 270, PC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Chan Pooi Leng v Jabatan Ketua Pengarah Tanah Dan Galian Persekutuan Unit Pembahagian Pusaka Perak Timur, Pejabat Tanah/Daerah, 33000 Kuala Kangsar (Mohamad Iqbal Shah bin Abdullasah, intervener/applicant) [2015] 9 MLJ 121; [2014] MLRHU 17, HC (refd)

A *Commissioners of The Municipality of Malacca v Sinniah* [1970] 1 MLRH 370 (refd)
Dadourian Group International & Ors v Simms & Ors [2009] EWCA Civ 169, CA (refd)
Federal Auto Holdings Berhad v V Subramaniam [1990] 2 MELR 67 (refd)
B *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, FC (refd)
Ghazali bin Arifin v Ahmad bin Bakar & Ors [1992] 1 MLJ 282, HC (refd)
Goh Hooi Yin v Lim Teong Ghee & Ors [1990] 3 MLJ 23, HC (refd)
Govindasamy s/o Muthulingam v Ooi Kee Chye & Anor [2012] 7 MLJ 254, HC
C (refd)
Hamdiah bt Ahmad & Anor v Pembangunan Tanah dan Perumahan Sdn Bhd [2020] 12 MLJ 786; [2019] 1 LNS 1981, HC (refd)
Harold Elliott and H Elliott (Builders), Limited v Pierson [1948] Ch 452, Ch D (refd)
D *Hj Suratmin bin Hj Othman v Yusof bin Hj Omar & Ors* [1997] MLJU 203; [1998] 2 CLJ Supp 380; [1997] 2 MLRH 543, HC (refd)
Holroyd and others v Marshall and others [1861–73] All ER Rep 414, HL (refd)
Ismail bin Morden & Anor v Pembangunan Tanah dan Perumahan Sdn Bhd 22NCvC-202–12 of 2014, (unreported) (refd)
E *JW Properties Sdn Bhd v Perbadanan Kemajuan Pertanian Selangor & Anor and another appeal* [2016] 1 MLJ 341, CA (refd)
Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd & Ors [2014] 11 MLJ 422, HC (refd)
KEP Mohamed Ali v KEP Mohamed Ismail [1981] 2 MLJ 10, FC (refd)
F *Kersah La' Usin v Sikin Menan* [1966] 2 MLJ 20 (refd)
Kubota Agricultural Machinery Sdn Bhd v Shahrizan Sdn Bhd & Anor [2001] MLJU 71; [2001] 6 CLJ 104, HC (refd)
Kuldip Singh & Anor v Lembaga Letrik Negara & Anor [1983] 1 MLJ 256 (refd)
Kwan Kwok Kwong & Anor v Trenolo Resources Sdn Bhd [2000] 3 MLJ 731, HC
G (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)
Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn
H *Bhd* [2017] 4 MLJ 697, FC (refd)
Lysaght v Edwards (1876) 2 Ch D 499, Ch D (refd)
Maheswari a/p Eliathamby & Anor v Koperasi Serbaguna Kebangsaan Bhd & Ors [2019] 1 MLJ 440, CA (refd)
Majlis Agama Islam Negeri Pulau Pinang v Wakil Diri Kepada Harta Pesaka Ali
I *Hussain, Si Mati & Anor* [2011] 13 MLRH 827 (refd)
Mayban Securities Sdn Bhd v Perumal a/l Murugesu [2008] 1 MLJ 832; [2007] 1 MLRH 558, HC (refd)
Mills v Haywood (1877) 6 Ch D 196, CA (refd)
Nasri v Mesah [1971] 1 MLJ 32, FC (refd)

PP v Teh Eng Wah [1999] 3 MLRH 502 (refd)
Paragon Finance plc v DB Thakerar & Co (a firm); Paragon Finance plc and another v Thimbleby & Co (a firm) [1999] 1 All ER 400, CA (refd)
Pembangunan Tanah dan Perumahan Sendirian Berhad v Pengarah Tanah dan Galian Negeri Johor & Anor [2019] MLJU 1501; [2020] 2 CLJ 399, HC (refd)
Pembangunan Tanah dan Perumahan Sdn Bhd v Raja Qahaarruddin bin Raja Abdul Aziz [2020] 2 MLJ 462, CA (refd)
Punca Klasik Sdn Bhd v All Persons in Occupation of the Wooden House Erected on a Portion of Land held under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor and another action (No 2) [1996] 5 MLJ 92, HC (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600, CA (refd)
RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188, FC (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1, FC (refd)
Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Ors [2009] 2 MLJ 765, CA (refd)
Sia Hiong Tee & Ors v Chong Su Kong & Ors [2015] 4 MLJ 188, FC (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)
Sinniah a/l Pampayan v Muthuvelu Pillai a/l Palanichamy Pillai [1997] 1 MLJ 403, CA (refd)
Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185, SC (refd)
Supreme Envy Sdn Bhd v Abul Rahim bin Sinon (suing and acting as personal representative and representing the estate of Sinon bin Karnen, the deceased) & Anor [2017] 1 MLJ 43, CA (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)
Teck Hong Development Sdn Bhd v Toh Chin Ann [2008] 4 CLJ 756, CA (refd)
Waimiha Sawmilling Company, Limited (in Liquidation) v Waione Timber Company, Limited [1926] AC 101, PC (refd)
Wan Nafi bin Wan Ismail v Hajjah Lijah bte Omar & Ors [1996] 5 MLJ 534, HC (refd)
Williams v Greatrex [1957] 1 WLR 31, CA (refd)
Wong Sin Meng v Wong Sam Moi & Anor [1991] 2 MLJ 277, HC (refd)
Yee Poh Nyen v Raji bin Kasan & Ors [2018] MLJU 1108, CA (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Evidence Act 1950 ss 32, 32(1)(b), 73A(1), (2), (5), 90, 90A, 106
Housing Development (Control and Licensing) Act 1966 s 22D
Legal Profession Act 1976 s 84
Limitation Act 1953 ss 6, 9, 22(1)
National Land Code ss 5, 433B, Form 14A
Rules of Court 2012 O18 r 19

A Penal Code s 468

Appeal from: Civil Suit Nos JA-23NCvC-36–12 of 2016 and JA-23NCvC-35–12 of 2016 (High Court, Johor Bahru)

B *Muhammad Zahier (Rosli Kamaruddin & Co) for the appellant.*
Russell Lua (HY Liew and SM Lau with him) (Lua & Mansor) for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

C **[1]** A purchaser who had bought a piece of land from the first purchaser way back in April 2007 is now claiming the land from the original registered owner. From her record she could show that she had paid the full purchase price to the first purchaser and there was also evidence to show that the first purchaser had paid the original registered owner in full.

D

[2] The original registered owner said it did not sell the land to the first purchaser for the first purchaser had bought it from four vendors in January 1968. The sale was through an attorney under a power of attorney by the four vendors. It is not disputed that the said attorney was one of the founding directors of the defendant.

E

POSITION OF THE PARTIES

F **[3]** What happened was that the original registered owner, the defendant here, had bought a piece of land under a Master Title CT 17421 Lot 4648 ('the land') from one Kheng Hup Co Ltd ('KH') and became its registered owner in May 1968. The defendant argued that the land claimed by the plaintiff in Lot 536 ('the lot') had been bought from the first purchaser who had entered into a sale and purchase agreement with the four vendors before the defendant's purchase of the same land from KH. The defendant argued that the plaintiff cannot trace her title to the defendant's purchase which came subsequent.

G

[4] However the land that the purchaser/plaintiff bought, is part of the many empty lots of land forming part of the master title which was subsequently subdivided with the plaintiff claiming title to the subdivided title held under Geran 316324 Lot 29589 Mukim Plentong, District Johor Bahru ('the subdivided title') now still under the name of the defendant.

H

I **[5]** There were receipts issued by the defendant to the first purchaser and also by one solicitors Messrs Goh Bin Lay & Co, which the plaintiff said acted for the defendant.

[6] The plaintiff duly informed the defendant of the purchase and wrote a few time to the defendant asking for the subdivided title. The plaintiff said she had been to the defendant's office on many occasions to ask for the subdivided title but was told to wait.

[7] At no material time did the defendant said that it did not recognise the interest and title of the first purchaser and with that the interest and title of the plaintiff.

[8] The plaintiff had been the one paying the quit rent and assessment for the lot since buying it from the first purchaser. She had taken possession of the land so to speak though nothing had been built on it yet.

PRAYERS OF THE PARTIES

[9] The plaintiff prayed for a declaration that the defendant is a trustee of the lot purchased for the plaintiff and also for an order for the defendant to execute the various instruments of transfer to effect the transfer of the subdivided title to the plaintiff. The defendant counterclaimed for trespass, damages and for removal of the plaintiff's caveat. The current director of the defendant DW1 who was the only witness for the defendant said the company does not have any record of the purchase of the lot purchased by the first purchaser from it and neither does it have any record of the payment to it of the full purchase price by the first purchaser. DW1 came into the picture only in December 2014 when according to him he took over control of the defendant from its previous shareholders by purchasing their shares.

[10] The defendant further relied on the fact that there is no privity of contract between it and the first purchaser and now between it and the plaintiff.

[11] As some of the documents are more than 20 years old and the maker either are dead or could not be found, the plaintiff had relied on s 90 of the Evidence Act 1950 with respect to the presumption that the signature of the person on the document is that of the person who had purportedly signed it.

PROCEEDINGS BEFORE THE HIGH COURT

[12] At the High Court the plaintiff's two suits against the defendant were heard together as the substratum of facts are the same except for the different lots of undivided share identified in the master title and subsequently the subdivided titles that were issued in the defendant's name. The other difference is in the name of the first purchaser from whom the plaintiff had purchased the two different lots and the purchase price and their respective sale and purchase

agreements; both between the four vendors collectively and the first purchaser and between the first purchaser and the plaintiff.

[13] The High Court that heard the parties was satisfied that the plaintiff had not explained the connection or relationship between the four vendors who collectively had sold the undivided lot in the land to the first purchaser from whom the plaintiff had purchased that piece of land vis a vis the defendant and that there is no privity of contract between the plaintiff and the defendant or for that matter between the defendant and the first purchaser. As such the defendant does not hold the land as constructive trustee or as bare trustee and there was also no legal obligation to transfer the subdivided title to the plaintiff.

[14] The learned High Court judge had granted the defendant the relief of vacant possession and removal of the plaintiff's caveat and an assessment of damages including exemplary damages for loss of use of the land and for wrongful entry of the plaintiff's caveat.

[15] As parties had earlier agreed that the evidence adduced in one case would be adopted for the other case with additional evidence being adduced with respect to the documents that are different and that the decision in one would bind the other, the High Court after having entered judgment for the defendant in Suit No JA-23NCvC-36–12 of 2016 also recorded judgment for the defendant in Suit No JA-23NCvC-35–12 of 2016. Correspondingly the plaintiff's claim in both the High Court suits were dismissed.

[16] The plaintiff being dissatisfied with the judgment against her, had appealed to this court against both decisions. The plaintiff said that her problem was not hers alone but that of many purchasers of various lots not subdivided then or who had bought from their respective first purchasers and a society called Persatuan Pembeli Tanah Taman Saujana, had been registered to protect and advance their interests.

[17] By consent of the parties and for good reason, both the appeals were heard together as the core underlying facts straddle both cases with the differences only in the particulars of the subdivided title and the purchase price and ancillary matters which do not affect the key issues in the disputes between the parties.

[18] This court shall proceed with the analysis of the evidence adduced in Suit No JA-23NCvC-36–12 of 2016 which appeal is in Civil Appeal No J-02(NCvC)(W)-1802–09 of 2018 involving Private Lot 536 which the plaintiff purchased from Jaafar @ Jappar bin Mydin for SGD7,000. The final title issued is Geran 316324 Lot 29589, Mukim Plentong, Johor Bahru.

[19] Parties had agreed that the appeal in this case shall bind the appeal in the other related case heard together in Civil Appeal No J-02(NCvC)(W)-1801–09 of 2018 corresponding to Suit No JA-23NCvC-35–12 of 2016 in the High Court.

[20] Indeed many of these cases have come before our courts and some have been reported and shall be referred to where relevant.

PRINCIPLES

Whether the defendant by accepting the full purchase price from the first purchaser is the ultimate vendor that had ratified the first SPA and recognised the title of the first purchaser to the lot

[21] It is of course true that the sale and purchase agreement between the first purchaser and the individuals acting as vendors namely Syed Jaffar bin Alwee, Syed Yahya bin Junid, Tengku Othman bin Abdullah and Syed Husain bin Junid ('the four vendors') vide Syed Ali bin Mohamed Al-Attas ('Syed Ali') as their attorney were for that lot of undivided land identified as Private Lot 536 of about 5,900 sqft, forming part of the land held under the master title. That land of about 160 acres was later bought by the defendant from KH, a Singapore company via a sale and purchase agreement dated 25 April 1968 ('the April 1968 SPA') for a purchase price of $800,625 and duly registered into the name of the defendant on 18 May 1968. The subdivided lot numbers used by the four vendors through their attorney Syed Ali were strangely the same as that used by the defendant after having bought the land from KH.

[22] Earlier on 26 July 1967 the four vendors had appointed one Syed Ali bin Mohamed Al-Attas as their attorney by way of a power of attorney with powers to sell, transfer, issue receipts and execute all transfer documents on behalf of the four vendors for a period of three years from the date of the power of attorney. There were about 800 individual undivided lots for sale.

[23] Interestingly the solicitors who prepared the power of attorney for the four vendors in favour of Syed Ali was Messrs Goh Bin Lay & Co as can be seen at p 46 of *RRT Jld* 2. The said Messrs Goh Bin Lay & Co was also the solicitors involved in the incorporation of the defendant as shall be shown later.

[24] The land was later developed into a housing estate called Taman Saujana complete with houses, mosque, surau, kindergarten, playing field and a public hall. The said Syed Ali was also one of the two initial subscribers at p 45 of *RRT Jld* 2 and a director of the defendant company when it was incorporated. See article 86 of the articles of association of the defendant company at p 30 of *RRT Jld* 2 where it is recorded as follows:

A ... The first directors of the Company shall be SYED ESA BIN ALWEE and *SYED ALI BIN MOHAMED AL-ATTAS*. (Emphasis added.)

[25] Another one of the four vendors by the name of Syed Husain bin Junid was also a director of the defendant.

B

[26] The defendant had been incorporated on 23 December 1967 and the sale and purchase agreement signed by the said Syed Ali as attorney for the four vendors with the first purchaser was on 6 January 1968 ('the first SPA'). The first purchaser for Private Lot 536 was Jaafar@ Jappar bin Mydin. There was another Private Lot 537 bought from one Aminah bt Mydin by the plaintiff which formed the subject matter of the other suit and appeal.

C

[27] DW1, Dato' Lee Ban Heng, the sole witness and director of the defendant, only came into the picture in December 2014. He said the defendant's stand is that the first purchaser had purchased the undivided lot from individuals unrelated to the defendant and further that defendant has no record of the purchase by the first purchaser, let alone that of the plaintiff from the first purchaser.

D

E

[28] That by itself cannot be determinative of the issue for otherwise one can disclaim and avoid one's legal obligations by saying that whatever documents the ultimate purchaser has, they are not in the defendant's possession nor does the defendant know about it. In fact by testifying that he does not have the documents it would only mean that the defendant cannot refute what the plaintiff had produced which tended to show her title to the lot subsequently subdivided by the defendant.

F

[29] These documents consist of the following:

G

(a) the January 1968 SPA or the first SPA which receipts of payments of the purchase price by instalments as allowed were issued by the defendant and by Messrs Goh Bing Lay & Co and the word 'jelas' in the schedule of instalment payments;

H

(b) the letters from the plaintiff to the defendant informing the defendant that she had purchased the Lot 536 and asking for the subdivided title once issued to be handed over to her; and

(c) the quit rent and assessment receipts issued by the relevant authorities in the name of the first purchaser which payments the plaintiff said was made by her after she had purchased the said lot.

I

[30] It is only too easy and convenient for the defendant to distance and dissociate itself from the four vendors who had sold the undivided lot to the

first purchaser. The plaintiff would not know more than whatever documents she has which authenticity she has no reason to doubt and for which she had duly informed the defendant in writing and which receipt had been acknowledged by the defendant.

[31] The defendant could have refused to accept and adopt the purchase by the first purchaser from the four vendors. The fact was that the defendant had allowed the said Syed Ali to find purchasers for the undivided lots and indeed had recognised the sale and purchase agreement entered into between the said Syed Ali as attorney for the four vendors in the first SPA.

[32] In fact in a letter dated 4 November 1978 from the defendant to one Encik Badri Mukibat who was representing the purchasers who had problems obtaining the subdivided titles, the defendant had at p 7 of *RRT Jld* 2 corrected the said Badri with respect to his assertion that the vendor was Syed Ali acting as attorney for the four vendors and that the vendor is the defendant. It went on to state that the said Syed Ali is one of its directors at the time of sale of the lot and who the other directors were.

[33] It would be logical and expedient for a company to be incorporated for a massive project involving a large piece of land of 160 acres with some 800 undivided lots to be subdivided eventually. Individuals may be adjudged a bankrupt and die whereas a company has perpetual succession and shareholders may come and go or dispose of their shares and new shareholders may come in if additional capital is needed.

[34] While there are some dotted lines initially between the four vendors and their attorney Syed Ali and the defendant, ultimately looking at the overall circumstances of the case and the documents presented as well as the conduct of the parties, we are quite satisfied that the dotted lines could comfortably be joined together to link the defendant to the lot in question as being substantially the real vendor having overall charge of the whole development project called Taman Saujana.

[35] No doubt it was a document introduced with leave of this court via a separate application filed earlier and the defendant's complaint that it did not have the opportunity to cross-examine the plaintiff on this document is noted. This document is about 40 years old and what this court shall comment on with respect to s 90 of the Evidence Act 1950 later in this judgment would apply equally to this document.

[36] We had a close look at the original all the receipts produced, yellow and brittle with age, and they are all in the late 1960s and early 1970s issued mostly by the defendant and together with some receipts issued by the solicitors

Messrs Goh Bin Lay & Co, they all add up to the total purchase price for the lot of land purchased by the first purchaser. From the receipts for Lot 536 Jaafar paid a deposit of $510 and monthly instalments of $30 for 33 months. The receipts were at Bundle B pp 50–63 in the bundle of documents filed in the High Court. The entries in the schedule of instalment payments showed that indeed a sum of RM510 had been paid upon the signing of the first SPA on 6 January 1968 with the following payments: 31 May 1967 $100, 30 July 1967 $200, 29 August 1967 $60, 1 October 1967 $60, 5 November 1967 $30, 5 December 1967 $30 and on 6 January 1968 $30.

[37] The learned trial judge was not persuaded that Messrs Goh Bin Lay & Co was the solicitors for the defendant as the first SPA is silent on that. We note however that in cl 4 the relevant deed of assignment and irrevocable power of attorney shall be prepared by Messrs Goh Bin Lay & Co in favour of the purchaser should the subdivided title not be issued yet upon the full payment of the purchase price by the purchaser. This cannot be a clause put in by the first purchaser for the first SPA is in the form of a standard form agreement put in by the party that would be developing the said Land into Taman Saujana.

[38] Further cl 14 of the first SPA states that the legal expenses of the vendors' solicitors Messrs Goh Bin Lay & Co shall be borne and be paid by the vendors. The Schedule of the first SPA refers to Private Lot 536 with the particulars of the master title also stated.

[39] We would say that looking at the memorandum and articles of association ('M&A') of the defendant and the signature of the said solicitors at the end of the M&A, it is more likely than not that the firm of Messrs Goh Bin Lay & Co were the solicitors that acted for the defendant with respect to its incorporation. See p 45 of *RRT Jld* 2. The said Messrs Goh Bin Lay & Co also attested the signature of both the attorney for the four vendors and the first purchaser in the first SPA.

[40] Whilst there was nothing preventing the first purchaser from instructing his own solicitors in the transaction, the general practice even then, which the court can take judicial notice of, was that purchasers would generally use the services of the 'developer' when it comes to sale and purchase of land in a housing project be it a 'developer' within the meaning of the then Housing Development (Control and Licensing) Act 1966 ('the HDA') or 'developer' not covered by the HDA in cases where it was selling undivided lots to be carved out from a master title with no construction on it.

[41] The practice was of course not conducive for the purchasers especially when some unscrupulous developers were collecting unauthorised deposits and signing the sale and purchase agreement later and also other practices that

left the purchasers unprotected. This led to the amendment to the Legal Profession Act 1976 ('the LPA') with the introduction of s 84 which came into force on 1 June 1977 via the Legal Profession (Amendment) Act 1977 Act A367 that prohibits a developer's solicitors from acting for the purchaser as well.

[42] The said solicitors did issue those receipts evidencing the payments of the purchase price by the first purchaser. Payment to one's agent is as good as payment to the client and in this case it is the defendant who on its own also issued receipts to the first purchaser for most of the instalment payments of the purchase price.

[43] With respect we cannot agree that 'payments to Messrs Goh Bin Lay & Co does not equate to payment to the defendant' as held by the learned trial judge at para [6] of the grounds of judgment of the High Court. There is no evidence that Messrs Goh Bin Lay & Co did not pay over these sums to the defendant. See the case of *Kuldip Singh & Anor v Lembaga Letrik Negara & Anor* [1983] 1 MLJ 256 where the solicitors did not pay over the loan sum to the vendor and the question was whether the solicitors acted for the purchaser who had secured the loan from Lembaga Letrik Negara or for the vendor.

[44] It did not escape the learned trial judge's eyes that there were 13 receipts issued by Messrs Goh Bin Lay & Co out of which six receipts were issued by the said defendant's solicitors in Bundle B pp 51–54 even before the defendant's incorporation on 23 December 1967 at Bundle B p 43. These are for the payments made on 31 May 1967, 30 July 1967, 29 August 1967, 1 October 1967, 5 November 1967 and 5 December 1967 which were prior to the incorporation of the defendant on 23 December 1967. Such payments, the defendant submitted confidently, could not have been made to the defendant. Then there were another 17 receipts issued by the defendant after incorporation.

[45] As for us we are more troubled and disturbed by the many receipts issued by the defendant after its incorporation than those issued by Messrs Goh Bin Lay & Co before the defendant's incorporation. How would the plaintiff or for that matter the first purchaser know of this other than to trust that the receipts had been properly issued. It is not unnatural for a firm of solicitors to issue receipts on behalf of the promoters of company before its incorporation. The connection in the receipts issued by Messrs Goh Bin Lay & Co lies in the Lot 536 which is also Lot 536 in the receipts issued by the defendant and that is the lot stated in the first SPA and the second SPA and PA.

[46] While that is a mystery it is not a matter for the plaintiff or for that matter the first purchaser to explain but a fact more specially within the domain

of the defendant to explain. Section 106 of the Evidence Act 1950 provides as follows:

> Burden of proving fact especially within knowledge.
>
> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

[47] It is not expected of purchasers to make a company search in the Companies Commission of Malaysia on the company issuing the receipts to find out when it was incorporated for what they understood to be the company that is ultimately selling the undivided lots of land to them. Surely the court can take cognisance of the common practice even in launches of housing projects by developers, purchasers would be incentivised to use the solicitors recommended by the developer on ground that no legal fees would be charged if they should so use and that the loan would be approved much faster if the purchasers use the same solicitors who would also act for the purchaser as borrower. Hardly is any search done on the developer's company or even the land which may still be under the master title especially if the property is an apartment or condominium.

[48] It would have to be a strange coincidence that the receipts all added up to the purchase price of the designated lot with the lot number also being written down on the receipts! The people who issued the receipts are no longer around or not known to the plaintiff. The said solicitor Miss Goh Bin Lay & Co has long ceased to practise as confirmed by both counsel for the parties. We would not expect the plaintiff to know who had issued the receipts in the name of the defendant.

[49] Fortunately for the plaintiff and the law being conscious of the difficulties to call makers of documents more than 20 years had introduced under the Evidence Act 1950 a s 90 to specially and specifically address this issue. It reads as follows:

> 90 Presumption as to documents 20 years old
>
> Where any document purporting or proved to be *twenty years old* is produced from any custody which the court in the particular case considers proper, *the court may presume that the signature and every other part of that document which purports to be in the handwriting of any particular person is in that person's handwriting*, and in the case of a document executed or attested, that it was *duly executed and attested by the persons by whom it purports to be executed and attested*. (Emphasis added.)

[50] No doubt the court has a discretion with respect to whether to draw a presumption as to the genuineness of the signature and with that the contents represented by the signature and the discretion has to be exercised judicially having regard to circumstance of the case. Here we are of the view that the

discretion should have been exercised in favour of the plaintiff seeing that some 40 years have passed since the receipts were said to have been issued.

[51] Moreover there is a ring of truth round about both the receipts of issued by the defendant and that issued by Messrs Goh Bin Lay & Co in that they all add up to the purchase price said to be required to be paid by the first purchaser of $1,500 and coupled with the schedule of instalment payments in exh P2 which bears the title 'Ranchangan Tanah Perumahan Saujana' with the dates entered and the amounts corresponding to the receipts exhibited with the receipt number as well as the lot number. These receipts are all stamped receipts.

[52] On column number 36 it is clearly marked with the word 'Jelas' which means that the full payment had been made by the first purchasers. It can be cross referred to exh P3 at p 280 record of appeal, where the receipt bearing number 7738 clearly stated that the payment is made for 'ansoran 35 & 36 (Jelas) di atas Lot 536'.

[53] The defendant would surely have documents terminating the sale and purchase agreement if the instalment payments had not been made in full.

[54] In *Commissioners of The Municipality of Malacca v Sinniah* [1970] 1 MLRH 370 it was held that 'It has been said that in the case of documents more than 20 years old the genuineness of which is disputed it is necessary for the courts to consider evidence, external and internal, of the document in order to enable them to decide whether in particular cases they should or should not presume proper signature and execution. If the circumstances are such which throw grave doubts as to the genuineness of the documents the courts will refuse to draw any presumption'.

[55] Here we find that the circumstances do not throw doubt on the genuineness of the signature and documents represented by it but rather strongly supportive of it.

[56] We find the explanation given in *Hj Suratmin bin Hj Othman v Yusof bin Hj Omar & Ors* [1997] MLJU 203; [1998] 2 CLJ Supp 380; [1997] 2 MLRH 543 to be helpful where it was held that:

> The person presenting a document under s 90 is relieved of the necessity of proving that it was executed by the person who is purported to be the executant but the court will not presume the correctness of any statement in the document ... It was not obligatory for this court to raise the presumption under s 90 of the Evidence Act 1950 as the language employed therein being 'may' and not 'shall'. The presumption is discretionary and where the court chooses to make the presumption, no further proof is necessary thereto. Of course, the discretion not to use the

presumption must be in consonance with law and justice and great caution should be exercised in its application. It must be exercised judicially and not arbitrarily and this rigmarole was carried out in the present case.

[57] In *Ghazali bin Arifin v Ahmad bin Bakar & Ors* [1992] 1 MLJ 282 KC Vohrah in presuming the genuineness of the signatures and thumbprint in an agreement more than 20 years old said: 'Having regard to s 90 of the Evidence Act 1950, the court may presume the genuineness of the signatures of the purported vendor and purchaser and the thumbprint of the purported person who witnessed the execution of the agreement'. The court would also look at the other extrinsic evidence to see if these documents, yellow as they are with age, has a ring of truth and an honest face.

[58] See also the following cases on the circumstances when the court would be inclined to invoke the presumption in s 90 of the Evidence Act 1950: *Federal Auto Holdings Berhad v V Subramaniam* [1990] 2 MELR 67; *Bakar Salleh v Hj Abdul Malik Bahadan* [1990] 3 MLRH 146; *Public Prosecutor v Teh Eng Wah* [1999] 3 MLRH 502; *Mayban Securities Sdn Bhd v Perumal a/l Murugesu* [2008] 1 MLJ 832; [2007] 1 MLRH 558; *Majlis Agama Islam Negeri Pulau Pinang v Wakil Diri Kepada Harta Pesaka Ali Hussain, Si Mati & Anor* [2011] 13 MLRH 827; *Azilah bin Hadri & Anor v Public Prosecutor and another appeal* [2013] 5 MLJ 309; [2013] 5 MLRA 212; *Chan Pooi Leng v Jabatan Ketua Pengarah Tanah Dan Galian Persekutuan Unit Pembahagian Pusaka Perak Timur, Pejabat Tanah/Daerah, 33000 Kuala Kangsar (Mohamad Iqbal Shah bin Abdullasah, intervener/applicant)* [2015] 9 MLJ 121; [2014] MLRHU 17.

[59] We are further of the considered view that even if the presumption under s 90 of the Evidence Act 1950 may not be invoked, we are more than satisfied that the same documents including the letter from the defendant dated 4 November 1978 to one Badri Mukibat could be admitted under the exceptions to the hearsay rule under s 32 as well as under s 90A of the Evidence Act 1950.

[60] Section 32(1)(b) of the Evidence Act 1950 makes exceptions and allows the documents to be admitted if they were made in the ordinary course of business:

> Section 32 Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant
>
> (1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or *whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable*, are themselves relevant facts in the following cases:

...

(b) when the statement was made by any such person in the ordinary course of business, and in particular when it *consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money*, goods, securities or property of any kind; or of *a document used in commerce, written or signed by him,* or of the date of a letter or other document usually dated, written or signed by him; (Emphasis added.)

[61] Certainly receipts, the schedule of instalment payments and letters are documents ordinarily kept in the business of the defendant which had allowed the first purchaser to pay by way of instalment payments and addressed the problem in the delay in getting the subdivided title and the calling of the maker would cause undue hardship and inconvenience to the plaintiff compared to the defendant who have easier access to the previous shareholders and directors of the defendant who would be able to shed light on the documents if they are forged or fabricated documents. It would be a Herculean task for the plaintiff to trace the maker of the receipts in the name of the defendant and the person who made the entries in the schedule of instalment payments.

[62] As for Jaafar, a resident in Singapore, the plaintiff testified that he had passed away not long after the second SPA and PA was signed and there is no evidence to the contrary. As she herself was a signatory to the second SPA and PA, that document can be admitted as evidence.

[63] Whilst the defendant had emphasised that the maker of the schedule of instalment payments could not be ascertained and the first purchaser was not called as a witness what had not escaped us is that the particulars of the duly stamped receipts showed an uncanny correspondence with the entries in the schedule of instalment payments where the lot number, date and amount are concerned. It has the ring of truth and an honest face.

[64] That for a document of more than 40 years old is far more important than why the defendant's name is not stated in the schedule of instalment payments and the identity of the person who made the entries in the said Schedule.

[65] Even though the defendant's name is not stated there is the title 'Ranchangan Tanah Perumahan Saujana' printed in big bold print on top of the schedule of instalment payments and the defendant had not adduced any evidence to show that there is another developer developing a housing project called by the same name!

[66] No police reports had been lodged by the defendant on account of these documents being forged or fabricated.

[67] Section 73A(1) of the Evidence Act 1950 may also be invoked as the original documents had been produced in the court below and before us for examination in cases where it is not reasonably practicable to secure the attendance of the maker. It reads as follows:

> Section 73A — Admissibility of documentary evidence in civil cases, etc
>
> (1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on *production of the original document,* be admissible as evidence of that fact if the following conditions are satisfied:
>
> (a) if the maker of the statement either:
>
> (i) had personal knowledge of the matters dealt with by the statement; or
>
> (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and
>
> (b) if the maker of the statement is called as a witness in the proceedings:
> Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is *dead*, or unfit by reason of his bodily or mental condition to attend as a witness, or *if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been without success*. (Emphasis added.)

[68] If evidentially that is not permissible, there is also the provision of s 73A(2) of the Evidence Act 1950 which allows a judge to exercise his discretion to dispense with the maker of the document, if he is satisfied that undue delay would otherwise be caused. It reads as follows:

> Section 73A Admissibility of documentary evidence in civil cases, etc
>
> (2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is *satisfied that undue delay or expense would otherwise be caused,* order that such a statement as is mentioned in subsection (1) *shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence*:
>
> (a) *notwithstanding that the maker of the statement is available but is not called as a witness;* and

(b) notwithstanding that the original document is not produced, if, in lieu thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be. (Emphasis added.)

[69] If authority is needed on the exercise of such a discretion under s 73A(2) of the Evidence Act 1950 one can refer to the following: *Bank of Tokyo-Mitsubishi (M) Berhad v Sim Lim Holdings Berhad & Ors* [2001] MLJU 125; [2001] 2 CLJ 474, *Arab-Malaysian Merchant Bank Bhd v Chong On Foh Medical Hall & Liquor Dealers* [1997] 4 MLJ 532; [1996] 2 CLJ 667, and *Kubota Agricultural Machinery Sdn Bhd v Shahrizan Sdn Bhd & Anor* [2001] MLJU 71; [2001] 6 CLJ 104.

[70] Under s 73A(5) of the Evidence Act 1950 the court is entitled to draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances as provided for below:

Section 73A — Admissibility of documentary evidence in civil cases, etc

...

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of subsections (1) to (4), *the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances,* and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and, where the proceedings are with assessors, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason, it appears to it to be inexpedient in the interests of justice that the statement should be admitted. (Emphasis added.)

[71] Thus reading the first SPA and the receipts issued by the defendant and that of Messrs Goh Bin Lay & Co together with the schedule of instalment payments and the subsequent second SPA and PA, this court would draw the inference that Syed Ali who signed the first SPA on behalf of the four vendors and who was the defendant's founding director, was in all probabilities authorised by the defendant to so act or that the defendant had otherwise ratified the sale of the lot as being made by the defendant.

[72] The fact that the defendant had accepted the payments of the purchase price to it as payments required by the defendant under the first SPA and as pleaded by the plaintiff in para 3 of her statement of claim, would mean, in legal language and consequence, that the defendant had adopted, affirmed, recognised and ratified the first SPA; otherwise it has no right to accept

payment from the first purchaser Jaafar from whom the plaintiff purchased the lot that is now represented in the subdivided title.

[73] We find no merits in the defendant's submission that the ratification of the January 1968 SPA by the defendant was not pleaded and so the court must not accept material facts not pleaded. Learned counsel for the defendant relied on the Federal Court case of *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188.

[74] As we have pointed out the fact of full payment of the purchase price by the first purchaser is what is material and there is no need for the word 'ratification' to have been used in the statement of claim as legal consequences need not be pleaded but a matter for legal argument during submission.

[75] There is no prejudice caused to the defendant who in fact had cross-examined the plaintiff's witnesses especially the plaintiff herself that there is no proof of payment to the defendant by the first purchasers. It is too late in the day to now raise the objection that ratification of the January 1968 SPA in the first SPA was not specifically pleaded. The defendant was certainly not caught by surprise for its stand was merely that the first SPA was not signed with the defendant but with unrelated individuals.

[76] If authority is needed one can refer to the Supreme Court's decision in *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 where the headnotes had summarised the facts as follows:

> The plaintiffs applied for an injunction, inter alia, to restrain the defendants from building on certain state lands ('the lands'), over which the plaintiffs claimed to have acquired native customary rights. At the trial, one of the reasons for the defendants' denial of the existence of such native customary rights was that the lands were situated within a river bank reserve on which no one could claim any title thereon by virtue of the Sarawak Land Code (Cap 81). Another reason was that the lands once belonged to Sarawak Shell Oil Ltd. In the final submission after the conclusion of all the evidence, an objection was raised by the Plaintiffs for the first time that such defences were not pleaded and ought to be disregarded under O18 r 7(1) of the Rules of the High Court 1980.

[77] It was held at p 190 as follows:

> ... *Therefore when such evidence represents a departure from pleadings, it should be objected to as and when and where it is adduced*, and it will be *too late when it only objected to later on, as in the final submission at the close of evidence* in the instant appeal. In these circumstances, *the party facing such evidence at variance from the pleadings, by failing to object, cannot be said to be taken by surprise, prejudiced, misled or embarrassed*. Otherwise, the other side of the coin would be, in the event of such

an objection raised at the stage of final submission being accepted by the court, that the party adducing such evidence may face the great risk of being denied leave to amend his pleadings in question at that stage.

Such evidence, when given without any objection by the opposing party, will further have the effect of curing the absence of such plea in the relevant pleading, in other words, the effect of overcoming such defect in such pleading ... (Emphasis added.)

[78] In *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 at p 12, it was held as follows:

... As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

[79] The Federal Court *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 had authoritatively expounded on the exceptions to the general rule that all material facts must be pleaded and that the court should not decide or grant reliefs based on an unpleaded matter. In that case the issue was whether 'estoppel' may be considered when it was not specifically pleaded. The Federal Court explained as follows at pp 341–342:

... The operative rule is said to be O 18 r 8(1) of the Rules of the High Court 1980, although, in our view, r 7(1) of that Order is of equal importance because of the substantive law upon the subject of estoppel. These two rules read as follows:

7(1) Subject to the provisions of this rule and rr 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.

8(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality:

(a) which he alleges makes any claim or defence of the opposite party not maintainable; or

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

In our judgment, the requirement of these rules is sufficiently met if the material facts giving rise to the estoppel are sufficiently pleaded without actually using the term 'estopped' (see *Lal Somnath Singh & Ors v Ambika Prasad* AIR 1950 All 121 at p 131). It may be desirable for a pleader to use that term; but it is not fatal if he does not. One must not lose sight of the object of modern pleadings which is to

A prevent surprise and to enable disputes to be litigated in an orderly fashion: *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308 at p 320.

Thus, although courts, through their pronouncements, require estoppel to be pleaded, there is also judicial recognition of circumstances that may take a particular B case out of the governing principle. First, there is the principle, already alluded to, that what requires to be pleaded are *the relevant facts which a litigant claims to give rise to an estoppel and not any special formula in staccato*: *Laws Holdings Pty Ltd v Short* (1972) 46 ALJR 563 at p 571.

C Secondly, even where a party has failed to set out the material facts in his pleading, but *there is occasioned no surprise to his opponent, a court may, in the interests of justice, permit the point to be taken*: *Coppinger v Norton* [1902] 2 IR 232 at p 243; *Co-operative Town Bank v Shanmugam Pillay* AIR 1930 Rang 265 at p 268; Laws Holdings. Useful reference may also be had to the instructive judgment of Edgar Joseph Jr J in *Rosita bte Baharom & Anor v Sabedin bin Salleh* [1992] 1 MLJ 379, D affirmed by the Supreme Court in [1993] 1 MLJ 393.

Thirdly, where there is no pleaded case of estoppel, but *there is let in, without any objection, a body of evidence to support the plea, and argument is directed upon the point, it is the bounden duty of a court to consider the evidence and the submissions and come to a decision on the issue.* It is no answer, in such circumstances, to say that the E point was not pleaded: *Oversea-Chinese Banking Corp Ltd v Philip Wee Kee Puan* [1984] 2 MLJ 1. (Emphasis added.)

[80] In *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600 the Court of F Appeal highlighted the fact that material facts may be pleaded without the legal consequences following them. At p 611 the Court of Appeal observed as follows:

... We would gratefully adopt what was said by Scrutton LJ, in *Lever Bros Ltd v Bell* [1931] 1 KB 557 at pp 582–583:

G

> The practice of the courts is to consider and deal with the legal result of pleaded facts, although the particular legal result alleged is not stated in the pleading.

[81] The issue of ratification was like the elephant in the room that no one H could miss and consequently no one, least the defendant could complain that it had been prejudiced when its stand was that it did not sign any sale and purchase agreement with the first purchaser and that they had not paid any purchase price to it. The plaintiff had in para 3 of her statement of claim pleaded the material facts of payment by the first purchaser to the defendant.

I

[82] The defendant by their conduct is estopped from disputing that it had not sold the designated lot of land to the first purchaser. The Federal Court in *Boustead Trading* explained the evolution and the various circumstances in which the doctrine of estoppel may be applied as follows at pp 344–345:

The time has come for this court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1952.

The doctrine may be applied to enlarge or to reduce the rights or obligations of a party under a contract: *Sarat Chunder Dey v Gopal Chunder Laha* LR 19 IA 203; *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84; [1981] 3 All ER 577; [1981] 3 WLR 565. It has operated to prevent a litigant from denying the validity of an otherwise invalid trust (see *Commissioner for Religious Affairs, Trengganu & Ors v Tengku Mariam bte Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222) or the validity of an option in a lease declared by statute to be invalid for want of registration (see *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old and Campbell Ltd v Liverpool Victoria Friendly Society* [1981] 1 All ER 897; [1981] 2 WLR 576). It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent (see *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387) and to create binding obligations where none previously existed (*Spiro v Lintern* [1973] 3 All ER 319; [1973] 1 WLR 1002). It may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see the *Amalgamated* case) or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning: *American Surety Co v Calgary Milling Co* (1919) 48 DLR 295; *De Tchihatchef v The Salerni Coupling, Limited* [1932] 1 Ch 330; *Taylor Fashions*.

We would add that it is wrong to apply the maxim 'estoppel may be used as a shield but not a sword' as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it. The true nature of the doctrine *in this context* is that stated by Lord Russell of Killowen in *Dawsons Bank v Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100 at p 108:

> Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action.

It is also wrong to think that the doctrine is confined to cases where a representation of fact has been made or where a party has been encouraged by another to believe in the existence or in the non-existence of a fact. The decisions of the Privy Council in *Sarat Chunder Dey* and the *Calgary Milling Co* (among others) to which we have referred earlier concerned cases involving representations not of fact but of law.

The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case ([1982] 1 QB 84 at p 122; [1981] 3 All ER 577 at

A p 584; [1981] 3 WLR 565 at p 575) as follows:

> The doctrine of estoppel is one of the most flexible and useful in the armory of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time, it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. *When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands*. (Emphasis added.)

[83] As was explained by Lord Denning in *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577 case at p 584:

> ... If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. *There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not*. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it. (Emphasis added.)

[84] When the plaintiff wrote to the defendant on at least two occasions informing them of the fact that she had purchased the Lot 536 from the first purchaser, the defendant did not revert to say that its record showed no evidence of the purchase.

[85] Moreover the plaintiff had been to the office of the defendant to enquire from them the status of the issuance of the subdivided titles but was told that it had not been issued. The defendant had not come clean and been candid to the plaintiff if indeed it is true that the first purchaser had not paid the purchase price to the defendant and hence the plaintiff cannot have a good title to the lot.

[86] It is incumbent on the defendant who chose the strategy of selling individual undivided private lots even before the master title is subdivided to keep a proper and up to date record of all transactions on these undivided lots

so that when the individual subdivided titles are issued, it can then discharge its legal duty to transfer the subdivided titles to the first purchaser or subsequent purchaser as the case may be.

[87] We would say the conduct of the defendant in not reverting to the purchaser after being notified of the second SPA and PA with respect to confirmation of the first purchaser's title to Lot 536 and the fact that the final subdivided title had been issued then to be more blameworthy than the plaintiff not having made a land search before purchasing from the first purchaser.

[88] The defendant's silence is deafening and more so when it said that the final subdivided title was issued on 24 November 2008 in Geran No 316324, Lot 29589, Mukim Plentong.

[89] The position of the law on subsale of land or property where its title has not been issued has always been by a sale and purchase agreement together with an assignment of the sale or a power of attorney. There is no need for the developer or original owner to be a party to the subsale sale and purchase agreement much less to give consent to the subsale but that the purchaser in the subsale need only to give notice of the sale or assignment to the original owner of the master title like the defendant.

[90] This is recognised even in a case covered by the Housing Development (Control and Licensing) Act 1966 ('the HDA') which now has statutory recognition in s 22D of the HDA which provides as follows:

> 22D Assignment
>
> (1) For the avoidance of any doubt, an absolute assignment in writing, under the hand of the assignor of the housing accommodation, not purporting to be by way of charge only, of the proprietary right or interest in the housing accommodation and the legal chose in action in the sale and purchase agreement in respect of a housing accommodation, of which *express notice in writing has been given to the housing developer* by the assignor in the manner set out in subsection (2) shall be deemed to have been effectual in law to pass and transfer the proprietary right, interest, chose in action and all legal and other remedies for the same to the assignee, from the date of the receipt of such notice by the housing developer, and the concurrence of the housing developer shall not be required.
>
> (2) Subject to subsection (8), every notice of assignment given to the housing developer pursuant to subsection (1) shall be delivered by the assignor or his solicitors to the housing developer at or after the completion of the sale and purchase between the assignor and the new purchaser of the housing accommodation and shall be accompanied by:

A

(a) duly stamped sale and purchase agreement between the assignor and the new purchaser of the housing accommodation, if any;

(b) duly executed deed of absolute assignment between the assignor and the new purchaser of the housing accommodation together, if applicable, with a letter of undertaking from the new purchaser or the new purchaser's financier, as the case may be, to deliver the duly stamped deed of absolute assignment within fourteen days after the same has been stamped; and

B

(c) full payment of all sums and outgoings due to the housing developer under the sale and purchase agreement.

C

(3) *A housing developer shall keep and maintain an up to date, proper and accurate register of all purchasers of the housing accommodation until separate or strata titles for all the housing accommodation in the housing development have been issued by the appropriate authority and registered in the names of all the purchasers of the housing accommodation in that housing development.*

D

(4) The housing developer shall provide all necessary and accurate confirmation of the records in the register whenever requested by a purchaser of the housing accommodation or his solicitors or his financier or his financier's solicitors subject to a payment of a fee not exceeding fifty ringgit or such amount as may be prescribed from time to time for meeting every request for confirmation in respect of all of the following:

E

(a) full particulars of the housing accommodation;

(b) the postal address of the housing accommodation;

F

(c) the current purchaser of the housing accommodation;

(d) the current chargee or assignee of the housing accommodation;

(e) the total amount due to the developer under the sale and purchase agreement as at the date of the confirmation; and

G

(f) such other matter as may be prescribed from time to time.

(5) Any person who requires any consent from a housing developer to any absolute assignment or assignment by way of charge in contravention of subsection (2) shall be guilty of an offence and shall, on conviction, be liable to a fine which shall not be less than fifty thousand ringgit but which shall not exceed one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.

H

(6) *Any housing developer who*:

(a) *requires any consent to any absolute assignment in contravention of subsection (1)*;

I

(b) imposes any condition to any absolute assignment or assignment by way of charge including requiring the new purchaser to execute any additional agreement or make any other payment in contravention of this section;

(c) fails to comply with subsection (3); or

(d) *fails or refuses to provide any confirmation in contravention of subsection* (4) or imposes any condition or any other fee in respect of any matter arising from subsection (4), *shall be guilty of an offence and shall, on conviction, be liable to a fine which shall not be less than fifty thousand ringgit but which shall not exceed one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both*.

(7) For the purpose of this section, references to 'new purchaser' wherever appearing shall include a purchaser's financier or any beneficiary under the estate of a deceased purchaser or an assignee under an absolute assignment whether with or without consideration.

(8) The expression 'completion of the sale and purchase' in subsection (2) in relation to a deed of absolute assignment executed in favour of a purchaser's financier or any beneficiary under the estate of a deceased purchaser or an assignee under an absolute assignment whether with or without consideration not in pursuance of a sale and purchase agreement shall mean the date of that deed of absolute assignment in which case paragraph (2)(a) shall not apply.

(9) This section shall apply to any housing accommodation where separate or strata title for the housing accommodation has not been issued by the appropriate authority. (Emphasis added.)

[91] The above provision is a statutory recognition of the common law position and in line with the provisions of s 4(3) of the Civil Law Act 1956 where an absolute assignment of undivided plots of land is concerned. Section 4(3) of the Civil Law Act 1956 reads:

(3) Any *absolute assignment, by writing, under the hand of the assignor,* not purporting to be by way of charge only, of any debt or other legal chose in action, of which *express notice in writing has been given to* the debtor, *trustee* or *other person from whom the assignor would have been entitled to receive or claim* the debt or *chose in action*, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, *to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor*. (Emphasis added.)

[92] It is not the position of the defendant that it had sold the said lot of undivided land to someone else. It merely said that it has no record of sale to the first purchaser or of notice of purchase from the plaintiff.

[93] The defendant offered no explanation as to the payments of the quit rent and assessment for the lot by the plaintiff who has possession of the

receipts issued by the authorities. Surely it could not have escaped the notice of the defendant that it had not been paying these outgoings required by law unless it could not be bothered about making payments altogether or that its record keeping as to who had purchased what is in such a mess!

[94] Whilst the absence of any documents produced by the defendant may be consistent with the fact that it did not have any transactions with the first purchaser or the plaintiff, the court must proceed to consider whether the plaintiff's version is more probable than the defendant's, having introduced the following key documents to evidence ownership of the lot in question as follows:

(a) the first SPA in the January 1968 SPA for the said lots between the individuals there and the first purchasers marked as exh P1;

(b) schedule of instalment payments for the said lots marked as exh P2;

(c) series of instalment payment receipts for the said lots issued by either the defendant's solicitors or the defendant marked exh P3; and

(d) the SPA between the first purchaser and the plaintiff ('second SPA) and the power of attorney collectively called the 'second SPA and PA' marked exh P4.

[95] As DW1 the director of the defendant only came in on board the company in December 2014, he would have no personal knowledge of the above documents and would not be in a position to rebut the plaintiff's evidence. He could have called the previous directors of the defendant to shed some light on these documents but for reasons best known to him, he had not chosen to do so.

[96] Stacked against the documents produced by the plaintiff, some of which are about 40 years old, we would say that the probabilities of the case would lean in favour of the plaintiff and against the defendant who simply said that it does not have any record of sale to the first purchaser or the plaintiff.

[97] Learned counsel for the defendant submitted that to deprive the defendant of its indefeasible interest and legal ownership of the lot in question, the plaintiff must prove that she is a purchaser within the meaning of s 5 of the National Land Code ('the NLC') where a 'purchaser' is defined as 'a person or body who in good faith and for valuable consideration acquire title to or any interest in land'.

[98] The plaintiff is not saying that the defendant's title to Lot 536 now held under Geran 316324 Lot 29589, Mukim Plentong, Johor Bahru is not indefeasible. The defendant has an indefensible title to the said lot but it had

also become a bare trustee holding the lot in trust for the plaintiff and with the issuance of the subdivided title, it should do what it is legally obliged to do, which is to transfer the title to the plaintiff.

[99] We are more than satisfied that she had shown that she is a bona fide purchaser. Much has been said about the plaintiff not having done a land search when she bought the said Lot 536 from the first purchaser Jaafar via the second SPA and PA for SGD7,000. That cannot be held against her for being trusting of both Jaafar and the defendant. At worse it is negligence on her part but surely the defendant cannot leverage and capitalise on that against her. Her failure to make a land search would be relevant if there is another third party purchaser who have made a search and does not see her interest in the title and then entered a caveat on the title upon signing a sale and purchase agreement with the defendant.

[100] This is not a case where the defendant is saying that it had sold the same lot to a third party who had paid full consideration and had become the registered owner. This is also not a case where the first purchaser is claiming title to the lot. When there are no competing interest in the subdivided title to the lot and when the plaintiff has been able to trace her title to the receipts issued by the defendant and referencing it to the first SPA and the second SPA and PA, the plaintiff would meet the test of a 'purchaser' in that she is a bona fide purchaser for valuable consideration.

[101] Whilst the qualified subdivided title was issued on 29 March 2000, under HS(D) 302220, Lot 29589, Mukim Plentong, Johor Bahru, the first purchaser had understood and so had stated in the para 4 of the recital to the second SPA that the transfer of the qualified subtitle could not be effected because of a restriction in the title as follows:

> AND WHEREAS an outright transfer of this sale could not be made due to the restriction as appeared in the Title to the said Property.

[102] Learned counsel for the defendant said that there was no such restriction and if that be so then the defendant should have transferred the land to the first purchaser. If for some reason that had escaped the notice of the defendant then surely when the plaintiff had informed the defendant about the need for the defendant to transfer the title to her, the defendant should have objected and said that the first purchaser had no title and so could not pass a valid title to the plaintiff. None of these were forthcoming from the defendant.

[103] A closer look at the qualified title at p 239 of the *RR Jld* 1 states in the express conditions that the registered owner ie the defendant shall pay all quit rent, outgoings, assessment and any other payments that may be imposed by

A the authorities and if these have not been paid, generally the land office would not allow a dealing like for example a transfer to be effected.

[104] Learned counsel for the defendant said that had the plaintiff done her proper search of the lot and due diligence on the lot she would have known that it is in the defendant's name. Of course it would be in the defendant's name as all subdivided titles issued from the subdivision of a master title would still bear the name of the original owner. It will then be later transferred to the name of the first purchaser or his assignee or nominee or donee. If the plaintiff had been wrong there, it is for the defendant to so point that to her when she notified the defendant of the subsale and also inquired about the subdivided title.

[105] Even if she had been negligent in not doing a land search and getting advice, we cannot understand how that would disqualify her from being a bona fide purchaser for valuable consideration. Surely just because she is negligent that cannot give the defendant the right not to want to transfer the subdivided title to her unless the defendant can show that it did not receive the purchase consideration from the first purchaser and that the plaintiff had not informed it of the subsequent subsale.

[106] Even if the defendant had not received any notification of the subsale from the plaintiff, this is not a case where the defendant had unknowingly sold the same lot to a bona fide purchaser for valuable consideration who might have acquired an indefeasible title to the said lot.

[107] The defendant further submitted that when the first SPA was executed on 6 January 1968, the defendant had already been incorporated on 23 December 1967 and as such there is no cogent reason why the defendant could not have entered into a sale and purchase agreement directly with the first purchaser. There is no need for us to speculate on 'what if' and 'why not' as the more pertinent point is that there is no cogent reason for the defendant issuing the receipts of instalment payments of the purchase price unless the defendant had recognised the first purchaser's title to the lot in the first SPA.

[108] Likewise the fact that the plaintiff does not know the relationship between the four vendors and the defendant cannot be held against her because what is far more important is how she had derived her title.

[109] Against the same backdrop and factual matrix on facts strikingly similar to the present case involving the same defendant and the same master title, the Court of Appeal in *Supreme Envy Sdn Bhd v Abul Rahim bin Sinon (suing and acting as personal representative and representing the estate of Sinon bin Karnen, the deceased) & Anor* [2017] 1 MLJ 43 in affirming the decision of the learned High Court judge Teo Say Eng J, agreed that even the subsequent sale in that

case had to be set aside for the third party was not a bona fide purchaser for valuable consideration and that there had been fraud on the part of the defendant, the registered owner of the master title who had transferred the subdivided title to the lot there to a third party instead of to the plaintiff as administrator of the estate of his father who had purchased the lot from the self-same four vendors here through the same attorney. The transfer was thus set aside in favour of the plaintiff purchaser there.

[110] It is the lack of bona fide on the part of the defendant in particular its director DW1 that is disturbing. It is DW1 that should have done the necessary due diligence on the defendant with respect to lots already sold by the defendant and not blame the plaintiff for being too trusting when purchasing the said lot from the first purchaser. The plaintiff would still not have this problem if the defendant had honoured its contractual commitment to transfer the lot to the first purchaser or his nominee, lawful donee or assignee under the second SPA and PA.

[111] The defendant argued that the plaintiff was not present when the first SPA was executed. Learned counsel for the defendant said the plaintiff could not deny that she does not have personal knowledge of what transpired in 1968 to 1970, including whether payments were really made to the defendant, who issued the receipts and whether the person who issued the receipts was authorised by the defendant to accept payment from the first purchaser.

[112] We must say that whilst the plaintiff had documents to show and support what she had asserted, DW2 who also did not know what had transpired during that period had nothing to show that would negate the plaintiff's title other than repeating what the first SPA had stated. It is a lame explanation from DW1 to say that he had checked with the previous management of the defendant and they said they knew nothing of the transactions.

[113] We would conclude on the balance of probabilities that the first purchaser in Jaafar had fully paid the purchase price when he bought the said lot from the defendant, which for all intents and purposes, had recognised, adopted, affirmed, accepted and ratified the first SPA in the January 1968 SPA and stepped into the shoes of the four vendors.

Whether the defendant is a bare trustee with respect to the said lot in the issued subdivided title

[114] The position of the registered owner who had been paid in full by the first purchaser here is that of a bare trustee or that of a constructive trustee who

A has an obligation to transfer the subdivided title to the subsequent purchaser like the plaintiff who had given notice of the transfer to the defendant as the registered owner.

B **[115]** The notices were given by the plaintiff's letter dated 26 April 2007 in Civil Appeal No J-02(NCvC)(W)-1801–09 of 2018 and it was duly acknowledged by the defendant. In respect of the letter dated 30 July 2007, though the address of the defendant stated in the letter and the address stated in the company chop are different, we are satisfied that on the balance of probabilities the defendant would have received the said letter.

C

[116] At any rate this is a case where the writ itself is sufficient notice on the defendant to effect the transfer and the defendant had not come to court to say that because of a lack of notice it had already sold the lot to a third party. By D analogy we would draw inspiration from the Court of Appeal in *Allied Bank (M) Sdn Bhd v Yau Jiok Hua* [2006] 5 MLJ 145; [2006] 3 CLJ 27 where it was held as follows:

> Under the circumstances of the instant appeal, we are of the view that no notice of demand need even be sent to the respondent who is the principal borrower himself. E There is a pre-existing debt which is payable 'on demand', other than the service of proceedings, is not a pre-requisite to the bringing of the action to recover the debt. The writ is a notice of demand in itself.

F **[117]** The plaintiff here had shown that she had in turn paid the full purchase price to the first purchaser as shown in the second SPA and PA dated 12 April 2007 between her and the first purchaser. Clause 1 after the preamble reads:

> IN CONSIDERATION of the sum of Dollar Singapore Seven Thousand (S$7,000.00) Only, paid by the Purchaser to the Vendor (the sum of which the G Vendor hereby acknowledges receipt hereof) ...

[118] The plaintiff's right to claim her title to Lot 536 is derived from the April 2007 SPA in the second SPA and PA in exh P4.

H **[119]** As such she was given and hence in possession of the original January 1968 SPA exh P1 in the first SPA and the receipts of payments exh P3 as well as the schedule of instalment payments exh P2.

I **[120]** Learned counsel for the plaintiff referred to the case of *Lysaght v Edwards* (1876) 2 Ch D 499 at p 506 where Jessel MR spoke of a vendor being a trustee for a purchaser upon a sale and purchase agreement being entered to by the parties as follows:

It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that *the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money,* a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz, possession of the estate and a charge upon the estate for his purchase-money. (Emphasis added.)

[121] More so when the purchaser had already paid the full purchase price to the vendor, the law would import and impose a trust on the vendor as a constructive trustee for the purchaser who has a beneficial interest in the property. In *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd & Ors* [2014] 11 MLJ 422 it was held as follows:

[25] In *Malaysian Assurance Alliance Bhd v Anthony Kulanthai Marie Joseph (suing as a representative of the estate of Martin Raj a/l Anthony Selvaraj, deceased)* [2010] 4 MLJ 749; the Federal Court held as follows:

Where a person is in possession of trust property which he knows does not belong to him, the law regards him as a constructive trustee. A constructive trust is simply a relationship created by equity in the interest of conscience. According to *Snells Equity* (26th Ed) at p 201, a constructive trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties. In *The Law of Trusts by JG Riddall* (3rd Ed) at p 359 it is illustrated as follows:

The constructive trust is a remedial device that is employed to correct unjust enrichment. It has the effect of taking title to property from one person whose title unjustly enriches him, and transferring it to another who has been unjustly deprived of it.

[122] Likewise the court in *Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Ors* [2009] 2 MLJ 765 held that:

[160] The law is quite settled. It is this. That a person who holds a property on a constructive trust is a constructive trustee in respect of that property (*Soar a Ashwell* [1893] 2 QB 390 at p 393) ...

...

[162] And trust which arise by operation of law are generally referred to as constructive trust. A constructive trust is imposed by equity in order to satisfy the needs of justice and good conscience. Lord Denning developed what he called as a

constructive trust of a new model (*Eves v Eves* [1975] 3 All ER 768 at p 771) by imposing a constructive trust whenever justice and good conscience required it (*Hussey v Palmer* [1972] 3 All ER 744 at p 747 (CA)). In *Gissing v Gissing* [1971] AC 886 at p 906; [1970] 2 All ER 780 at p 790 (HL), Lord Diplock aptly said of resulting or implied trust in these sage words:

> the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. On the other hand, he is not bound by any inference which the other party draws as to his intention unless that inference is one which can reasonably be drawn from his words or conduct.

[163] In sharp contrast, no formalities are needed to create a constructive trust. The concept of constructive trust is tied up with the principles of fairness and good conscience. Usually a constructive trust is imposed over the disputed property and constructive trusteeship is placed on the person who is responsible for that disputed property ... (Emphasis added.)

[123] The Federal Court in *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1, referred to the doctrine of bare trustee in *Lysaght*'s case as follows:

> [53] We are in full agreement and adopt the above well founded principles of law which, according to Jessel MR in *Lysaght*'s case, 'has been settled for centuries'. Applying the said principles to the facts of the present case before us, we hold that *MPM, being the registered proprietor of the land after executing the sale and purchase agreements with the earlier purchasers and having received the full purchase price, was a bare trustee (that is, a person without beneficial interest in the property)*; and to borrow the words of Jessel, MR in *Lysaght*'s case '... the court will not permit the vendor afterwards to transfer the legal estate to a third person'. In other words, MPM in the present case, was therefore not permitted in law to sell or transfer the land to the new purchasers (including the appellant).
>
> [53] The Court of Appeal was right in finding that *MPM, after having entered in the sale and purchase agreements with the earlier purchasers and received the full payments of the purchase price, had become a bare trustee and as such was not permitted to deal with the lots*. We are in agreement with the Court of Appeal that the subsequent sales, transfers or conveyances of the lots by MPM to the new purchasers (including the appellant) were void ab initio, as MPM did not have any legal or requisite capacity to enter into such agreements. (Emphasis added.)

[124] The Federal Court in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 explained the imposition of constructive trust as follows:

> (a) a constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of the property (usually not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another, citing with approval *Paragon Finance plc v DB Thakerar & Co (a*

firm); Paragon Finance plc and another v Thimbleby & Co (a firm) [1999] 1 All ER 400;

(b) there was a strong element of unjust enrichment and lack of probity on the part of the first respondent;

(c) it is settled law that trust is an exception to the common law rule of privity of contract. As such the appellant could enforce the trust against both the first and second appellant;

(d) the appellant was entitled to trace her half share of the property into the hands of anyone who acquired it; and

(e) it was not a case in which the appellant deliberately sought to evade complying with s 433B of the Land Code and she was not guilty of such misconduct. Section 433B had no application to the constructive trust imposed upon the first respondent.

[125] See also *JW Properties Sdn Bhd v Perbadanan Kemajuan Pertanian Selangor & Anor and another appeal* [2016] 1 MLJ 341 (COA).

[126] The Court of Appeal in another case involving the same defendant with a disturbingly similar factual matrix and the same master title but a different lot and a subsequent purchaser in the case of *Supreme Envy Sdn Bhd v Abul Rahim bin Sinon (suing and acting as personal representative and representing the estate of Sinon bin Karnen, the deceased) & Anor* [2017] 1 MLJ 43 held that second respondent (which is the same defendant in this case) was a bare or constructive trustee and had no title to sell or transfer the property to the third party there. The second respondents who is the defendant here did not attend trial and no witnesses were called on its behalf. See the High Court's decision of Teo Say Eng J in *Abdul Rahim Sinon v Pembangunan Tanah dan Perumahan Sendirian Berhad & Anor* [2016] 1 LNS 1079 which was affirmed by the Court of Appeal.

[127] Whilst it is up to the defendant to decide which suit it wants to defend when sued by the first purchaser or subsequent purchaser, it is strange to note that the defendant that had vowed no connection with the four vendors in the first SPA with the purchaser concerned, could receive the full purchase price from a subsequent purchaser and leave the two purchasers to slog it out in court.

[128] One would have thought that a company like the defendant would prize consistency of approach and stand where the base document evidencing a valid purchase by the first purchaser consisted of the SPA with the self-same four vendors through the self-same attorney in the power of attorney given!

[129] There was also another case that was drawn to the attention of the learned trial judge. In 22NCvC-180–08 of 2013 one purchaser, Zaleha bt Daud, of a lot in the same master title had sued both the defendant here and also Supreme Envy Sdn Bhd. The learned judge commented that as there was a consent judgment recorded on a without admission of liability basis and it had agreed to hand over the land to the plaintiff purchaser there whereas in the present case the matter is being disputed.

[130] Whilst that is true and each case must be decided on its own merits, this court could not help but notice that for a similar factual matrix the defendant would want to settle when its stand is that it does not recognise and is not a party to the first SPA between the four vendors and the purchaser. Perhaps the defendant is exercising its right to decide which case to contest and which to settle based on the propensity of evidence of payments of purchase price to it.

[131] There was also another case in 22NCvC-202–12 of 2014 of *Ismail bin Morden & Anor v Pembangunan Tanah dan Perumahan Sdn Bhd* (unreported), the same defendant herein where two other parties were added in as defendants in Choo Jack Kie and See Kai Seng. The learned judge noted that the defendant was absent from the proceedings. One wonders why the defendant did not apply to set aside the judgment taken in its absence.

[132] The fact of the defendant not being present to defend proceedings brought by purchasers was also noted by the Court of Appeal in *Pembangunan Tanah dan Perumahan Sdn Bhd v Raja Qahaarruddin bin Raja Abdul Aziz* [2020] 2 MLJ 462 where in a suit that started in the sessions court Raja Qahaarruddin ('Raja Qahaar') had sued for the return of the purchase price paid to the defendant and where the lot in question had been sold by the same defendant to a third party. The defendant did not appear and so a judgment in default was entered. The defendant failed in setting aside the judgment and did not appeal against that decision dismissing its application to set aside the judgment.

[133] Later Raja Qahaar proceeded with execution by way of public auction against the land of the defendant but after the auction the defendant refused to deliver up the titles to the land that had been auctioned. Contempt action was taken against the directors of the defendant and it was only then that the defendant consented to the delivery of titles. Subsequently Pembangunan Tanah dan Perumahan Sdn Bhd ('PTDP') brought an action to impeach the default judgment which had been obtained some three years ago.

[134] The suit was successfully struck out by the High Court in an application by Raja Qahaar under O18 r 19 of the Rules of Court 2012. The Court of Appeal affirmed the decision of the High Court and dismissed the appeal by

PTDP. The facts again were uncannily similar to the stand case involving the same master title, the same four vendors and its attorney and the only difference is in the lot number and the purchase price and in that case there was a subsequent sale by PTDP to a third party.

[135] See also a subsequent case involving another first purchaser and the same defendant on facts almost on all fours with minor differences in *Hamdiah bt Ahmad & Anor v Pembangunan Tanah dan Perumahan Sdn Bhd* [2020] 12 MLJ 786; [2019] 1 LNS 1981 where the High Court granted a declaration that the defendant is a trustee of the said lot and a further order that the defendant do execute the relevant transfer instruments in favour of the plaintiffs. The same defences raised by the defendant here were also raised there.

[136] The position of the law is as clear as broad daylight in that a vendor who had received the full purchase price to a property is a bare trustee for the purchaser and a court of law would impose on the vendor a constructive trust, holding the property for the purchaser and persons deriving title or claiming title through the purchaser as in this case.

[137] Any refusal to transfer the said property to the plaintiff here would be a breach of trust by the defendant.

Whether the four vendors could enter into a valid sale and purchase agreement with the first purchaser of the undivided land in the lot before they had become its registered owner

[138] The learned trial judge had held that the four vendors, not being registered proprietors, did not have title to the lot and as such could not pass any title to first purchaser through the first SPA in the January 1968 SPA. In fact to the learned trial judge the four vendors did not become the registered owner of the land. It was the defendant that became its registered owner on 18 May 1968.

[139] According to the defendant, the four vendors, being mere purchasers of the master title, did not have any valid right to sell Lot 536 which was part of the land held under the master title, to the first purchaser.

[140] The defendant further submitted that it could not have sold the land to Jaafar @ Jappar bin Mydin on 6 January 1968 because it only became the registered owner on 18 May 1968. So, any transaction for the sale of land held under Master Title 4648 CT 17421 made between the company and any purchaser before 18 May 1968 is null and void because the company does not have title to the land prior to 18 May 1968.

[141] The principle relied on was the *nemo dat* principle which essentially states that one who has no title cannot pass title to another person; in other words one cannot transfer effectively what one does not have.

[142] The learned trial judge referred to the following two cases enunciating they above principle as follows in the grounds of judgment:

> [13] In *Ngan & Ngan Holdings & Anor v Central Mercantile Corp (M) Sdn Bhd* [2010] 1 MLJ 822, it was stated at p 833 that:
>
> > [21] It is trite law that no person can give a better title than he had — *nemo dat quod non habet*. Therefore, WTK, not being the registered proprietor of the property was never in a position to give the property as a gift or gratuity to the second defendant.

[143] In *Sia Hiong Tee & Ors v Chong Su Kong & Ors* [2015] 4 MLJ 188, it was stated at p 201 as follows:

> [34] the above finding by the Court of appeal found support in the common law rule of *Nemo Dat Quod Non Habet (nemo dat* rule in short). The *nemo dat* rule lilerally means 'no one can transfer what he has not got' (*Bishopsgate Motor Finance Corporation, Limited v Transport Brakes, Limited — Winsor Garage, Third Party* [1949] 1 KB 322 as per Denning LJ). This is sometimes called the 'derivation' principle: the transferee's rights derived from those of the transferor. The *nemo dat* rule protects the true owner of the goods (right of ownership) and the innocent purchaser who purchases the goods from non-owner gets no title as the non-owner could not pass good title because he has none ...
>
> [14] As the four vendors had no title capable of being passed to Jaafar it must follow that Jaafar similarly had no title to pass to the plaintiff.

[144] See also *Teck Hong Development Sdn Bhd v Toh Chin Ann* [2008] 4 CLJ 756 at p 762A.

[145] Whilst we have no problem with the *nemo dat* principle, we do have problem with its application to the sale of land in the context of this case. The *nemo dat* principle must be subject to the overriding qualification that one can sell and transfer title to land which may only be acquired *in futuro*. First we must debunk the misconception that until one becomes the registered owner of a piece of land, one cannot enter into an agreement to sell the said land. As long ago as 1872 Lord Chancellor (Lord Westbury) in *Holroyd and others v Marshall and others* [1861–73] All ER Rep 414 at p 418 observed as follows:

> ... If a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired.

> This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. *For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained*. (Emphasis added.)

[146] In *Harold Elliott and H Elliott (Builders), Limited v Pierson* [1948] Ch 452 at p 455 Harman J held as follows:

> At law, A may contract to sell to B any defined subject matter and can enforce the contract if by the time when he is obliged to do so he has obtained a sufficient interest or can compel other interested parties to concur in the sale. *It matters not at all that at the date of the contract A had no interest if he obtain it in time to fulfil the bargain ...* (Emphasis added.)

[147] The above principle of law was applied in Malaysia in the case of *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23 at p 30 where Edgar Joseph Jr J held as follows:

> Moreover, at common law, a vendor by the mere sale does not affirm that he is at the date of the contract the owner of the land, or even in possession of it, but promises that when the time comes for making his title, he will be prepared to do so: *R v Cunningham* (1899) 1 WALR 9; 21 Australian Digest 729; *Harold Elliott and H Elliott (Builders), Limited v Pierson* [1948] Ch 452. And there is nothing inherently impossible in the performance of an agreement to sell land belonging to a third person: *Rosel v Adam* [1876] 2 VLR (L) 170; 4 Australian Digest 662.

[148] In *Sinniah a/l Pampayan v Muthuvelu Pillai a/l Palanichamy Pillai* [1997] 1 MLJ 403 at pp 407–408, KC Vohrah J (as he then was) held as follows:

> ... It is clear that the plaintiff could sell and in fact, merely sold this right to own the premises in the future albeit contingent on the three conditions earlier stated. The plaintiff could validly pass title to the second defendant once the premises was transferred to himself by the state government ...

[149] It is akin to conditional contracts that a vendor may enter into with respect to a piece of land that is not yet registered in its name but for which it had entered into an agreement to purchase. There is thus nothing prohibiting a vendor from selling land that it will be acquiring in the future.

[150] Our Court of Appeal had occasion to dispel the misconception that until one becomes a registered owner of land one cannot enter into a valid sale and purchase agreement to dispose it of in *Besharapan Sdn Bhd & Ors v Agroco Plantation Sdn Bhd & Anor* [2007] 1 MLJ 101; [2006] 4 CLJ 878, where it

held as follows at para (1) of the headnotes:

> Even though the second and third appellants did not have any registered right or interest in the subject land on the date of execution of the 1989 Agreement, that did not render the agreement, which was otherwise valid and enforceable, to be void or invalid. The second and third appellants at the material time had sufficient interest in the subject land to enter into a binding agreement, by which they agreed to transfer the subject land when the title or interest in the subject land had been registered in their names. In other words, the parties agreed that the agreement would only become enforceable the moment the second and third appellants' right or interest in the subject land was registered under the Ordinance. There was no difficulty with such an arrangement and, thus, there was no merit in the first ground canvassed by the appellants.

[151] With the greatest of respect we cannot agree with the learned trial judge's conclusion that as the four vendors did not become the registered owner of the land they were incapable of passing title to the first purchaser for the respective lot and based on the *nemo dat* principle the plaintiff could not have derived any title from the first purchaser.

[152] Some jurists have referred to this aspect of the law as the law on expectancy of title. Thus in *Kersah La' Usin v Sikin Menan* [1966] 2 MLJ 20 at p 22 Raja Azlan Shah J (as His Royal Highness then was) explained as follows:

> The first consideration is whether the plaintiff could enter into a contract with the defendant's (deceased) father involving a subject matter which was then not subsisting in the sense that the said land was still in his mother's name. It is not disputed that he was the sole beneficiary and that he was in such a position that when the time came he could perfect the title of the purchaser. The fact that at the date of contract the vendor had neither title nor power to call for title is not of itself an answer to a suit of specific performance by the purchaser ...

[153] The position of the law is clear in that the defendant, having received the full purchase price from the first purchaser, is legally bound to transfer the subdivided title in the lot to him or to his nominee, lawful donee or assignee under the second SPA and PA.

[154] Learned authors of land law in Malaysia are agreed on this area of the law. In *Kwan Kwok Kwong & Anor v Trenolo Resources Sdn Bhd* [2000] 3 MLJ 731, Jeffrey Tan J (later FCJ) referred to Teo Keang Sood and Khaw Lake Tee, *Land Law in Malaysia, Cases and Commentary* (2nd Ed) and Visu Sinnadurai in *Sale and Purchase of Real Property in Malaysia* and held as follows:

> Where a purchaser under a contract of sale had paid the full purchase price and entered into possession of the land under an expectancy of title, the courts have held that the purchaser was the equitable owner of the land whose rights as against the vendor to have the full title to the land formally transferred to him could not be lost by reason of mere delay or laches (Teo Keang Sood and Khaw Lake Tee, *Land Law*

in Malaysia, Cases and Commentary (2nd Ed) at pp 202–203). As a rule, that is unless otherwise provided, a vendor of immovable property free from encumbrances is obliged, immediately upon his receipt of the full purchase price from the purchaser, to convey the full benefits of both the legal and beneficial ownership of the immovable property to the purchaser. Inter alia, that vendor is obliged to execute and deliver a good and registrable memorandum of transfer of the immovable property free from encumbrances together with the document of title to the purchaser. Indeed, 'one of the main obligations of a vendor under a contract for the sale of land is to give a purchaser a title 'free from all encumbrances'. The effect of such an obligation is to ensure that the purchaser on registration, acquires a title with no existing encumbrances which would in any way fetter the purchaser's right to deal with the land subsequently or which would affect the purchaser's enjoyment of the land' (*Sale and Purchase of Real Property in Malaysia* by Visu Sinnadurai at p 186). 'A vendor is under a general duty to deliver a title free from all encumbrances on the date for completion and not on the date the contract was entered into. It is therefore, quite possible for a vendor to deal with the land during this interim period with the understanding that any such encumbrance on the land would be discharged on the date for completion' (*Sale and Purchase of Real Property in Malaysia* at p 187)'.

[155] Learned counsel for the defendant submitted that the first SPA had been frustrated on 18 May 1968 when on that date KH entered into the May 1968 SPA with the defendant. There is no need to speculate what happened to the first SPA as the defendant must have chosen to recognise the first purchaser's rights under the first SPA because it accepted full payment of the purchase consideration stated in the first SPA from the first purchaser and even issued receipts for it or through its solicitors Messrs Goh Bin Lay & Co. There was thus no good reason for the first purchaser to sue the four vendors for while awaiting the subdivided title to be issued he must have been given vacant possession of the lot for the assessment receipts were issued in his name.

[156] Indeed by cl 5 of the first SPA the first purchaser Jaafar was entitled upon the execution of the agreement to enter into possession of the said land and enjoy all the profits and other benefits deriving therefrom.

[157] Surely the local authority would not be accepting change of name from the registered owner of the master title for the assessment receipts unless they are satisfied that there were some documents to substantiate the purchase by the first purchaser.

Whether the refusal of the defendant to transfer the subdivided titles to the plaintiff would be fraud against the plaintiff

[158] Having found on the balance of probabilities that indeed the defendant had received the full purchase price from the first purchaser and that the first purchaser had subsequently conveyed his title to two lot to the plaintiff and

that the plaintiff had duly notified the defendant of the transfer, it is then not open for defendant to refuse to effect the transfer now that the subdivided title has been issued.

[159] To allow the defendant to refuse the transfer would be fraud perpetrated in the plaintiff. In *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697 Jeffrey Tan FCJ had dealt with the nefarious manifestations of fraud as follows:

> What amounts to 'fraud'? 'It is not easy to give a definition of what constitutes fraud in the extensive signification in which the term is understood by Civil Courts of Justice. The courts have always avoided hampering themselves by defining or laying down as a general proposition what shall constitute fraud. Fraud is infinite in variety (*Reddaway (Frank) & Co Ltd v George Banham & Co Ltd* [1896] AC 199 at p 221). The fertility of man's invention in devising new schemes of fraud is so great, that the courts have always declined to define it, or to define undue influence, which is one of the many varieties, reserving to themselves the liberty to deal with it under whatever form it may present itself (*Allcard v Skinner* (1887) 36 Ch D 145 at p 183). Fraud, in the contemplation of a Civil Court of Justice, may be said to include properly all acts, omissions and concealments which involve a breach of a legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another (Story, Eq Jur 187). All surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one is considered fraud (Finch 439). Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to (*Green v Nixon* (1857) 23 Beav 530 at p 535)' (Kerr on *Fraud and Mistake* (7th Ed) at p 1). 'The concept of fraud is notoriously difficult to define' (*Cavell USA, Inc and another v Seaton Insurance Co and another* [2009] EWCA Civ 1363 per Longmore LJ, Mummery and Toulson LJJ in agreement). We would not hazard to define 'fraud'. We would just say that 'fraud' is a generic term which also covers all manner of cheat. Deceit and dishonesty.

[160] Here the refusal of the defendant is dressed more respectably on the high ground of no privity of contract between the defendant and the plaintiff or for that matter with the first purchaser and that it does not have any record of purchase and payments by the first purchaser. However the defendant's hands are tainted having issued the many receipts and some through its solicitors Messrs Goh Bin Lay & Co that now, trying to justify its refusal to transfer the subdivided titles on some high pedestal of legal argument, would be devoid of merits.

[161] What was observed in *Dadourian Group International & Ors v Simms & Ors* [2009] EWCA Civ 169 by Lady Justice Arden on fraud is worthy of reminder:

> At times he came close to suggesting that fraud can only be established where there is direct evidence. If that were the case, few allegations of fraud would ever come to trial. Fraudsters rarely sit down and reduce their dishonest agreement to writing. Frauds are commonly proved on the basis of inviting the fact-finder to draw proper inferences from the primary facts.

[162] No fraudster would want to leave a trail of documents or for that matter any traces of it for the defrauded to reconstruct the link to culpability. Fortuitously for the plaintiff, she had held on to dear life the original documents in the January 1968 SPA and the receipts of more than 40 years and the schedule of instalment payments. More than that, consistent with ownership and having taken possession, she has been paying the quit rent and assessment as evidenced from the receipts produced.

[163] Whilst we appreciate that having paid quit rent and assessment is not conclusive of one's title to the lot, it is surely a matter to be taken into consideration in a case where the defendant's strategy in developing Taman Saujana is to sell the undivided lots to the master title to purchasers and then apply for subdivision of the master title.

[164] This is not a case of an illegal squatter occupying the lot in issue with no documents whatsoever to support ownership as held in *Punca Klasik Sdn Bhd v All Persons in Occupation of the Wooden House Erected on a Portion of Land held under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor and another action (No 2)* [1996] 5 MLJ 92 at p 115B-D as follows:

> It is my judgment that the payments of quit rent by both Lim and Ng can never give them titles to those parts or portions of the land. Mustapha Hussin J in *Yong Yin Siew v Chong Sheak Thow* [1988] 3 MLJ 115 said at p 118 that:
>
> > The defendant had produced receipts for payment of quit rent in respect of the land in question. The fact of who pays the quit rents for the land does not point to who is the owner of the land. Anyone can go and pay the rents, as is usually done by those in occupation either by way of lease, or rent or by sheer squatting.
>
> The same approach was adopted by Mohd Noor bin Hj Ahmad J in *Mohd Ali Jahn bin Yusop Sahibjahn v Zaleha bte Mat Zain & Anor* [1994] MLJU 474; [1995] 1 CLJ 533. I venture to say that payments of quit rents, assessment rates, electricity and water bills cannot be used as barometers to gauge ownership of lands without cogent supportive evidences in that direction.

[165] See also the case of *Ang Toon Chew & Sons (M) Sdn Bhd v Personal Representatives of Mohamed Taib bin Yusoff, deceased* [1998] 5 MLJ 481 where it was held at p 493B that:

> ... The payments of those quit rents were said to be ineffectual to give the plaintiffs entitlement to Grant 28716 and HS(D) 1971 ...

[166] In *Yee Poh Nyen v Raji bin Kasan & Ors* [2018] MLJU 1108 Tengku Maimun JCA (now CJ) held that the law does not require direct evidence, but recognises that frauds are commonly proved on the basis of inviting the fact-finder to draw proper inferences from primary facts. Her Ladyship opined as follows:

> Fraud in actions seeking to affect a registered title means actual fraud or dishonesty of some sort and not what is called constructive or equitable fraud (see *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81). Whether fraud exist is a question of fact which is to be determined in the light of the facts and circumstances surrounding each particular case (see *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136; *Hj Suratmin bin Hj Othman v Yusof bin Hj Omar & Ors* [1997] MLJU 203; [1998] 2 CLJ Supp 380; [1997] 2 MLRH 543). Fraud may occur where the designed object of a transfer is to cheat a person of any existing right or where by a deliberate and dishonest act a person is deprived of his existing right (see *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196).

[167] Here the defendant, instead of verifying with the previous owners of the company, had chosen the path of wilful blindness to documents which would cry out for an explanation from the defendant.

[168] In the light of the evidence introduced which the defendant had merely contradicted by saying that it has no knowledge or record of, this court is perfectly permitted to make the necessary inferences that the deliberate refusal to effect transfer of the said lot to the plaintiff is to deny the plaintiff's right to the land over the years.

[169] After the defendant had obtained subdivision of the master title of Lot 4648 CT 17421 to individual final subdivided titles and being knowingly aware that Lot 536 had been sold to Jaafar @ Jappar bin Mydin, it had refused to register the land under the purchaser's name but instead, was content to remain the registered proprietor of the subdivided lot under its name. This was done all along even with the knowledge that the first purchaser had fully settled the purchase price for otherwise we would have expected the defendant to terminate the agreement and to sell the lot to subsequent purchaser.

[170] The evidence of the police report lodged by the plaintiff dated 30 August 2016 after she had made a land search on 24 August 2016 on the final subdivided title showed that the lot is in the defendant's name and more than there are third parties' caveat on the title. One was by a Mr Chong Chee Heng which the caveator subsequently removed and the other by Sejahtara Aman Aset Sdn Bhd which may well indicate an attempt by the defendant to dispose of the lot to others.

[171] We noticed that pursuant to the leave granted by this court for the plaintiff/appellant to introduce further documents in the record of appeal, the plaintiff had from pp 106–201 exhibited the charge sheets against DW1 and one Mr Chong Chee Heng, another director of the defendant, with respect to various charges relating to forgery under s 468 of the Penal Code in relation to forged withdrawal of caveat forms.

[172] We would go by the salutary principle that a person is innocent until proven guilty where criminal charges are concerned. Moreover the lot in question is not the subject matter of the various criminal charges preferred against DW1 and one Mr Chong Chee Heng.

[173] We take note of the fact that the registrar of land titles had lodged a registrar's caveat on initially 121 lots of land in Taman Saujana and later only 26 lots remained caveated by the registrar as reported in *Pembangunan Tanah dan Perumahan Sendirian Berhad v Pengarah Tanah dan Galian Negeri Johor & Anor* [2019] MLJU 1501; [2020] 2 CLJ 399 as symptomatic of the problems affecting the many purchasers who have to slog it out in court to have their claims vindicated.

[174] The defendant who is the plaintiff there had argued that the police reports lodged were on alleged forgery of withdrawal of caveat forms which are not 'dealings' within the meaning of the NLC.

[175] The High Court refused to remove the registrar's caveat and dismissed the application by PTDP. Evrol Mariette Peters JC observes as follows:

> [19] I am unable to agree with the submission of the plaintiff in view of s 320(1)(a) of the NLC which refers to 'fraud or improper dealing'. The provision is, therefore, disjunctive, and in this case the emphasis is on 'fraud', since the registrar's caveats were entered to preserve the lots of land pending investigations on caveat withdrawal forms that were allegedly forged.
>
> [20] Reference is also made to Chang Min Tat in *Seet Soh Ngoh v Venkateswara Sdn Bhd & Anor* [1976] 1 MLJ 242; [1975] 1 LNS 159:
>
> > Section 320(1)(a) empowers the registrar to enter his caveat for the *prevention of fraud* and improper dealing and if such a possible dealing is brought to the notice of the court and the registrar is before the court, I see no reason why the court cannot in such a case order him to do so. (Emphasis added.)
>
> ...
>
> [28] I am of the view, therefore, that the registrar's caveats are justified since the first defendant had acted upon information provided to him and upon the request made by PDRM. This is akin to the case of *Agrimal Project Sdn Bhd v Pendaftar Hakmilik, Pejabat Tanah Dan Galian, Johor & Ors* [1998] 5 MLJ 673; [1997] 3 CLJ Supp 491, where a registrar's caveat was entered on the application of PDRM.

A [29] The first defendant in this case was acting on the request of PDRM, and was not in a position to decide on the completion or conclusion of the investigation. The interests of the 143 caveators, or lack thereof were not factors for the first defendant to consider, since these were not private caveats but registrar's caveats, and it had been reiterated that the request had been made by PDRM.

B

[176] We agree with learned counsel for the defendant that whether the act of the defendant consisted of a subsequent sale to the third party or a refusal to transfer to the first purchasers and the present purchaser in the plaintiff, the effect is the same: it is to deprive the plaintiff of her rightful title to the land.

C

[177] In the Privy Council case of *Waimiha Sawmilling Company, Limited (in Liquidation) v Waione Timber Company, Limited* [1926] AC 101 at pp 106–7, Lord Buckmaster held:

D If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also *fraud may be established by a deliberate and dishonest trick causing an interest not to be registered* and thus fraudulently keeping the register clear. (Emphasis added.)

E **[178]** As referred to in *Supreme Envy Sdn Bhd v Abul Rahim bin Sinon (suing and acting as personal representative and representing the estate of Sinon bin Karnen, the deceased) & Anor* [2017] 1 MLJ 43 involving the same defendant which had transferred a lot on the same master title to a subsequent third party purchaser who had become its new registered owner, the Court of Appeal had
F no difficulty in finding fraud on the part of the defendant and it affirmed the High Court's decision in setting aside the transfer to the third party.

[179] The standard of proof for fraud in civil claims is that of the balance of probabilities. In *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5
G MLJ 1; [2015] 7 CLJ 584 Richard Malanjum CJ (Sabah and Sarawak) held that the standard of proof for all civil matters, whether they involve elements of fraud or otherwise, must now be interpreted as being on a balance of probabilities. The learned CJ (Sabah and Sarawak) observed 'that in a civil claim even when fraud is alleged the civil standard of proof, that is, on the
H balance of probabilities, should apply ... in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities ... (and that) *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 ... is no longer the law ...'. The standard of proof for fraud in a civil proceeding is clearly now on a
I balance of probabilities.

[180] See also *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697.

[181] The incongruity between proofs of fraud in civil and criminal matters had been put to rest in *Maheswari a/p Eliathamby & Anor v Koperasi Serbaguna Kebangsaan Bhd & Ors* [2019] 1 MLJ 440 where Abang Iskandar JCA (now CJSS) concurred with *Sinnaiyah*'s case as follows:

> However, it must be noted as a matter of law that the standard of proof applicable in civil cases had been clarified by our apex court in the case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584. That decision was delivered on 10 August 2015. That case has put right, once and for all, what is the correct and proper standard of proof that shall be applicable in all civil cases in Malaysia. In the *Sinnaiyah & Sons Sdn Bhd* our apex court had occasion to say as follows:
>
> > The correct principle to apply is ... where it was stipulated that at law, there are only two standard of proof, namely beyond reasonable doubt for criminal cases and on the balance of probabilities for civil cases. As such, even if fraud is the subject in a civil claim, the standard of proof is on the balance of probabilities. There is no third standard. Therefore, it is up to the presiding judge, after hearing and considering the evidence adduced as being done in any other civil claim, to find whether the standard of proof was attained. The criminal aspect of the allegation of fraud and the standard of proof required is irrelevant in the deliberation.

[182] We are more than satisfied that based on the above standard of proof the plaintiff had established fraud on the part of the defendant.

Whether the plaintiff's claim is barred by limitation or laches

[183] Learned counsel for the defendant also argued that the plaintiff is guilty of laches and that the claim is barred by limitation. However for cases of breach of trust s 22(1) of the Limitation Act 1953 is clear and it stipulates as follows:

> No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action:
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

[184] We further agree with learned counsel for the plaintiff that the law on limitation period starts to run when 'there is a clear and unequivocal threat to dispossess the plaintiff from the land by the defendant'.

[185] In *Nasri v Mesah* [1971] 1 MLJ 32, at the headnotes, the Federal Court decided that:

A (2) time begins to run for the purpose of limitation from the date of any infringement or threat of infringement of the appellant's right under the agreement. A cause of action on a contract accrues on the date of breach and in the case of actions founded on contract, therefore, the time runs from the breach.

B **[186]** In the instant case the defendant did not bring an action for trespass until the plaintiff had filed her claim for specific performance.

[187] In *Bolo v Koklan* [1930] AIR PC 270, the Privy Council held that in determining when the right of claim begins or arises in an action founded on C any other right:

> There can been no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the respondent/defendant against whom the suit is instituted.

D

[188] In the case of *Wong Sin Meng v Wong Sam Moi & Anor* [1991] 2 MLJ 277 it was held:

> There was no evidence that there was ever an infringement or a clear and unequivocal threat of an infringement of the right of the appellant/plaintiff before E the commencement of the action. The service of the writ on the respondent/defendant constituted notice of the appellant/plaintiff's intentions to assert his right. When the appellant/plaintiff's application for summary judgment was opposed by the first respondent/defendant on 8 October 1986, such opposition constituted an unequivocal threat to infringe the right of the appellant/plaintiff. F The limitation period therefore commenced to run at the earliest on or about 8 October 1986.

[189] Quite apart from the fact that the defendant stands as a trustee for the G plaintiff, if at all limitation is to run against the plaintiff, it only started to run when there is a 'first clear and unequivocal threat' to the plaintiff's right to claim transfer of the said lots to herself. That should be the case since the first purchaser and then the plaintiff had been in the possession of the said lots for almost 40 years without any hindrance. If at all time has started to run against H the plaintiff, it does so from the date the defendant filed their defence and counterclaim on 29 July 2018.

[190] Learned counsel for the defendant said that the first purchaser's cause of action accrued on the date of issuance of separate individual title on 29 March I 2000. It was submitted that the plaintiff's claim would be barred by ss 6 and 9 of the Limitation Act 1953 as more than 12 years had lapsed; the first purchaser had 12 years to register it in his name. See *Wan Nafi bin Wan Ismail v Hajjah Lijah bte Omar & Ors* [1996] 5 MLJ 534 at p 535 and *Govindasamy s/o Muthulingam v Ooi Kee Chye & Anor* [2012] 7 MLJ 254 at pp 25–26.

[191] However, there is no evidence to show that the defendant would be executing the transfer form in Form 14A of the NLC and delivering the subdivided title to the first purchaser. The plaintiff said she had gone to the defendant's office to enquire about her title but was told to wait.

[192] As we had observed under the second SPA the first purchaser Jaafar had understood that there was a restriction of some kind affecting the registration that prevented the registration at that time. In any event he had taken possession though he had not built anything on the land as can be seen from the assessment receipts in his name as produced by the plaintiff.

[193] On the contrary the defendant had not produced any quit rent and assessment receipts though the said qualified title is registered in its name.

[194] In the light of the above finding, the defence of laches is even more remote and illusory. In the context of a vendor being a bare trustee or constructive trustee, it does not lie in the vendor's mouth to resist specific performance on ground of laches. In *Williams v Greatrex* [1957] 1 WLR 31 it was observed as follows as summarised in the headnotes:

> Held: (3) That the purchaser having paid the deposits on and having entered into possession of the land, became the equitable owner of the land under a contract binding on the vendor such that the vendor could not now object to specific performance on the ground of laches unless he could show that he had not acquiesced in the purchaser's acts of possession or that the purchaser had abandoned the contract; and that the evidence showed sufficient acquiescence by him and no abandonment by the purchaser. Accordingly, despite the lapse of time, the purchaser was entitled to specific performance on payment of the balance of the price and interest thereon for the intervening years.

[195] Lord Denning in that case further opined as follows:

> If he wished to exclude the purchaser, he ought to have taken possession himself. He never did so. I am quite clearly of opinion that, as long as the purchaser remained in possession under a contract which entitled him to be there, he had an equity which the courts will protect. There was no need for him to claim specific performance in order to give him a right to be there. Laches or delay is not a bar to this action.

[196] In the case of *Mills v Haywood* (1877) 6 Ch D 196, it was held that the possession of purchaser on the land is an assertion of his rights against the vendor as follows:

> ... where the purchaser in possession has no right or title to such possession except as purchaser, his possession is an assertion on his part of his right under the contract of purchase, and acquiescence in his possession is a recognition by the vendor of this right.

[197] In the present case the plaintiff had been paying the quit rent and assessment since she purchased the lot from the first purchaser. Surely the name of the first purchaser could not have appeared in the receipts for the assessment issued by the Majlis Bandaran Johor Bahru for no apparent reason. More than that the defendant would have known if the quit rent and assessment had not been paid if it is still the lawful owner of the lot for then penalty would be imposed and the land might suffer forfeiture to the state.

[198] Either the defendant could not be bothered at all in that it could not care less or more likely a case where it no longer has any interest in the said lot. The fact that a subsequent owner/shareholder of the defendant company has no knowledge because of poor record keeping of the previous owner/shareholder is no justification to refuse transfer in ground of limitation of laches.

Whether this is a fit case for appellate intervention

[199] It is trite law that an appellate court will not intervene unless the trial court had been shown to be plainly wrong in arriving at its decision or where there had been no or insufficient judicial appreciation of the evidence. See *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 (COA) and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (FC) at pp 10–11 where the Federal Court affirmed the Court of Appeal's decision in setting aside the judgment of the High Court on the issue of the validity of a will as follows:

> [11] In gist, the pivotal question raised by the appellants was whether the term 'insufficient judicial appreciation of the evidence' used by the Court of Appeal constituted a new test for appellate intervention. We think it is important to examine this proposition in the light of what the Court of Appeal had said in its judgment beginning from para 27 which we have reproduced earlier but repeated herein for the purpose of emphasis. It states:
>
> > ... Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think, appropriate that we say what judicial appreciation of evidence involves.
>
> [12] And the Court of Appeal went on to explain in para 28 as follows:
>
> > A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria ... He must also test the evidence of a particular witness against the probabilities of the case.

[13] In making the observations above, the Court of Appeal cited the following cases: *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229; *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257 *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61; *Yusoff bin Kassim v Public Prosecutor* [1992] 2 MLJ 183 at p 188; *Rex v Low Toh Cheng* [1941] 1 MLJ 1; *Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110; *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165b; *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 LI R 1; *State of Rajasthan v Hanuman* AIR 2001 SC 282 at p 284; *Tek Chand v Dile Ram* AIR 2001 SC 905.

[14] In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, *the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test*. (Emphasis added.)

[200] After having analysed critically and examined the process of evaluating the evidence adduced which are in the main consisting of documents, some of which are more than 40 years, we are of the view that the learned trial judge had been plainly wrong in not sufficiently appreciating the documentary evidence of payments already made by the first purchaser to the defendant and the payments of quit rent and assessment for the lot purchased by the plaintiff from the first purchaser.

[201] In the process of evaluating the evidence the learned trial judge had drawn the wrong inferences of fact in concluding that there was no link between the four vendors and the defendant and in failing to conclude that the defendant was the ultimate vendor that had recognised, adopted, affirmed and ratified the first SPA. We also find that there is evidence of due notice having been given by the plaintiff to the defendant on the title to the lot that she had acquired from the first purchaser.

PRONOUNCEMENT

[202] We were thus constrained to allow the plaintiff's/appellant's appeal and to set aside the order of the High Court. We granted the prayers in paras 11a, b and c of the plaintiff's statement of claim declaring that the defendant is a trustee for the plaintiff for the subdivided title to the lot held under Geran 316324 Lot 29589, Mukim Plentong, Johor Bahru and that the defendant do

execute the necessary instrument of transfer within seven days from the date of this order, failing which the Pengarah Tanah dan Galian or the relevant officer be authorised to execute the necessary instrument of transfer in favour of the plaintiff.

[203] The same shall bind the parties in Civil Appeal No J-02(NCvC)(W)-1801–09 of 2018 as agreed by the parties.

[204] We further ordered costs of RM25,000 for each case here and below in favour of the plaintiff/appellant subject to payment of allocatur.

Appeal allowed with costs of RM25,000 subject to payment of allocator.

Reported by Mohd Kamarul Anwar